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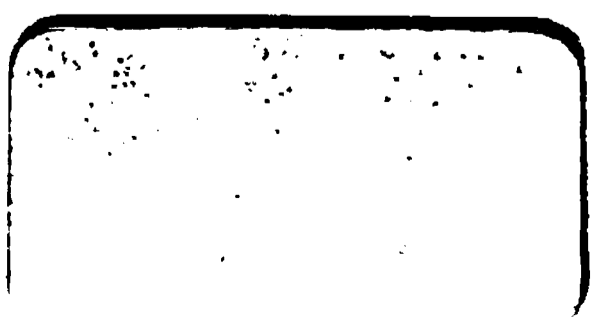
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGEMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. XXXVII.

SAN FRANCISCO:
BANCROFT-WHITNEY CO.
LAW PUBLISHERS AND LAW BOOKSELLERS.
1886.

1 21738

JUL 29 1902

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AMERICAN DECISIONS.
VOL. XXXVII.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

USHER v. SEVERANCE.

[20 MAINE, 9.]

IN ACTION OF LIBEL TWO ARTICLES CAN NOT BE COUPLED to ascertain if one of them is libelous or not, the articles not being published in the same paper.

ALLEGATIONS OF PLAINTIFF BEING PROVED, LAW IMPLIES MALICE in the defendant, and the burden of disproving it is thrown on him.

JURY DETERMINES WHETHER LANGUAGE IS LIBELOUS or not.

TRESPASS on the case by Samuel Usher against Luther Severance, for a libel published by the latter in the Kennebec Journal of November 5, 1834. The article accused Usher, who was postmaster of Kingfield, in Somerset county, of opening a prize letter and taking therefrom a bill for a large amount. The defendant admitted writing the article, but offered in evidence another article published in the same journal for November 19, retracting what had been formerly said, and other evidence tending to show that he had reason to believe the truth of what was stated in the first article. Several instructions were asked for by the defendant and refused. These are stated in the opinion. The judge charged that no action could be maintained if the article was published without malice, but that the article was itself evidence of malice, as its truth had not been set up in justification; that defendant had a right, as editor, to publish that plaintiff had been arrested, and upon what charge, but he had no right to assume that plaintiff was guilty or to hold him out as such. Jury found for plaintiff; if the instructions withheld were correct or those given were incorrect, verdict to be set aside; otherwise judgment to be rendered thereon.

Boutelle, for the defendant.

Tenney, *contra*.

By Court, WHITMAN, C. J. This is an action for the publication of a libel upon the plaintiff, in a newspaper edited by the defendant. A verdict was returned for the plaintiff; but with the right on the part of the defendant, to have it set aside, and a new trial granted, "if the instructions requested and withheld, should have been given, or those which were given were erroneous." The first instruction requested and withheld was, "that the article of fifth of November taken in connection with that of the nineteenth is not on its face libelous." This instruction, we think the judge did right in withholding. We know of no authority for coupling two articles, not simultaneously published, and not in the same paper or book, for the purpose of ascertaining whether one of them was libelous or not. In this case a fortnight intervened between the two publications. The other instructions requested were, that, "if the jury believed, that the defendant, when he published the article, had good reason to believe it true, and published it from good motives and justifiable ends, they ought to find for the defendant." "That if the defendant published the article in good faith, believing the public had an interest in knowing the facts contained in it, the burden of proving express malice lies on the plaintiff;" and, "that, if from the evidence, they were satisfied, that the defendant honestly believed, that the conduct of the plaintiff was such, as induced the defendant to believe the plaintiff had been guilty of the charge imputed to him by the defendant, and that the defendant did not publish the article maliciously, the jury may well find for the defendant."

The counsel for the defendant, Mr. Boutelle, has cited numerous authorities, and his argument has been elaborate and ingenious in support of these propositions. But the authorities, upon examination, will be found to apply to a class of cases very different from the one at bar. They are cases arising from communications to a body having power to redress a grievance complained of; or having cognizance of the subject-matter of the communication, to some intent or purpose or other; and to cases of communications made confidentially, or upon request, where the party requesting information had an interest in knowing the character of the individual inquired after; and to cases where a party might be honestly endeavoring to vindicate his own interest; as in the case of the slander of title; or of guarding against any transac-

tion, which might operate to his own injury; and to cases of words not in themselves actionable, except from the special injury which they might occasion.

The case at bar is one of a publication addressed to no person or body of men having power to redress a grievance; and, it is rather superfluous to add, not a confidential communication to any one; and does not appear to have been designed to guard against any injury imminently threatening the individual interest of the publisher; nor does it present a case of words in themselves not actionable. The allegation in the plaintiff's writ is, that the publication accuses him of the crime of larceny. This allegation being proved, malice is by law implied, and it would be for the defendant to disprove it. The burden of proof in such cases is thrown upon him. But it is incumbent on the plaintiff first to prove, his allegation, that the defendant has, by his publication, accused him of the crime. The terms of the article may, to this purpose, be explicit and unequivocal; or they may be obscure and unintelligible, in the absence of extraneous proof to show their meaning; as in the case of the use of words, which are mere provincialisms or cant phrases, or terms of art, or where words are used qualifying or restraining the meaning of other words used. In every case it is believed to be the province of the jury, under the instruction of the court, to determine the import of the language used: 1 Car. & P. 245.¹ The instruction of the court is nothing more than the term imports. It is not mandatory but advisory. The instruction requested of the court, we can not, therefore, on the whole, regard otherwise than as properly withheld.

The argument of the counsel for the defendant seems to concede, that the presumption of malice in this case, if the matter of the publication may be regarded as malicious, is inferable from publication; and in the absence of all evidence to the contrary, the court would be justified in advising the jury, that malice was to be inferred, but the evidence to do away with such presumption, as has already been seen, must be different from that relied upon in the defense. There was, then, no evidence in the case, which should have had that effect, and the charge of the judge to the jury would not seem to have been, substantially, at variance with the position admitted by the counsel for the defendant, to have been correct.

Judgment on the verdict.

1. *Hunt v. Algar*, 6 Car. & P. 245.

PUBLICATIONS CONCERNING PUBLIC OFFICIALS.—Publication of the truth, from good motives and for justifiable ends, though it reflect on the government or its magistrates, does not constitute libel; though it is otherwise if done with evil intent: *Respublica v. Dennie*, 2 Am. Dec. 402. And editors may publish what they please in relation to the character and qualifications of candidates, but they are responsible for the truth of all they so publish: *King v. Root*, 21 Id. 102. For instances of publications that have been held libelous, see *Riggs v. Denniston*, 2 Id. 145; *Thomas v. Croswell*, 5 Id. 269; *Stow v. Converse*, 8 Id. 189; *Robbins v. Treadway*, 19 Id. 152; *King v. Root*, 21 Id. 102.

MALICE IN LIBEL.—The declaration in libel need not ordinarily allege that the words were published maliciously; it is sufficient to state that they were false and injurious: *King v. Root*, 21 Am. Dec. 102; malicious intent is to be inferred, as a conclusion of law, from the publication of a libel, where there is no evidence to show the truth of the alleged libel, or its publication, for some warrantable purpose: *Commonwealth v. Blanding*, 15 Id. 214; but express malice must be proved in privileged communications: *King v. Root*, 21 Id. 102; *Remington v. Congdon*, 13 Id. 431.

DAVIS v. FRENCH.

[20 MAINE, 21.]

ADMINISTRATOR IS PERSONALLY LIABLE on a note which he signs as administrator of the deceased.

THE defendant signed a note as administrator of one Zadock French. On this note the present action was brought. It was agreed that judgment should be rendered against him, either individually and without costs, or against him in his representative capacity and with costs, as the court might adjudge. The case was submitted upon briefs.

G. B. Moody, for the defendant.

Cutting, contra.

By Court, **SHEPLEY, J.** Where the cause of action exists against the intestate, and the administrator for a sufficient consideration promises to pay, the action may be brought against him in his own right, and a general judgment should be entered against him: *Wheeler v. Collier*, Cro. Eliz. 406; *Atkins v. Hill*, Cowp. 284. But since the statute of frauds such a promise must be in writing. And no judgment can in such an action be entered against the estate of the intestate: *Hawkes v. Saunders*, Id. 289. It was decided in the case of *Trevinian v. Howell*, Cro. Eliz. 91, where the executor for a sufficient consideration promised to pay a debt due from the testator, and the action was brought against him as executor, that a judgment against him *de bonis*

propriis was not erroneous. But in *Segar v. Atkinson*, 1 H. Bl. 102, where the action was against the administratrix, it was decided, that a count on her own promise to pay a debt due from the intestate might be joined with counts on promises of the intestate; and that the proper judgment on all the counts was *de bonis testatoris*. And Heath, J., in delivering the opinion, says: "This is the common mode of declaring against executors and administrators to save the statute of limitations; but if it were to be considered as making them personally liable, I do not know who would ever take out administration."

The true doctrine on this subject appears to be, that where the cause of action existed against the deceased, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration. And in such case the action should be brought against him in his own right, if the plaintiff would have a judgment against him in preference to one against the estate. A promise from the executor or administrator, as such, to pay a debt due from the deceased may be alleged in an action brought against him as executor or administrator, and in such case the judgment must be *de bonis testatoris*. But the executor or administrator can not create a debt against the deceased. And it is immaterial how clearly the intent to do so may be expressed; for having no power to bind the estate he only binds himself by such a contract. And there can therefore be no judgment *de bonis testatoris*; and the action should be brought declaring against him in his own right: *Barry v. Rush*, 1 T. R. 691; *Sumner v. Williams*, 8 Mass. 199 [5 Am. Dec. 83]; *Myer v. Cole*, 12 Johns. 349.

In this case, the contract originated with the administrator, and there is no evidence that the debt also did not, and no judgment can be entered against the estate which he represents.

Judgment against defendant generally, without costs.

PERSONAL LIABILITY OF EXECUTORS ON CONTRACTS CONCERNING THE ESTATE.—An administrator is personally liable for articles purchased by him, though they are for use of an estate: *Harding v. Evans*, 29 Am. Dec. 255; though not for funeral expenses, unless he has contracted for them, or expressly promised to pay them: *Gregory v. Hooker*, 9 Id. 646. An executor promising to pay a debt of his testator, and who has assets at the time of the promise, is personally liable: *Sleighter v. Harrington*, 7 Id. 715. So he is personally liable on contracts made by him concerning the necessary matters relating to the estate which he represents: *McEldery v. McKenzie*, 27 Id. 643. And where the executor of a deceased partner carries on the business with the surviving partners, he becomes a copartner, and is liable personally for the debts of the company: *Alsop v. Mather*, 21 Id. 703. An executor

conveying real estate under an order of the probate court is personally liable for a breach of the covenant of warranty contained in the deed: *Sumner v. Williams*, 5 Id. 83. The principal case was referred to with approval in *Luscomb v. Ballard*, 5 Gray, 405.

STATE v. GREAT WORKS MILLING AND MFG. CO.

[20 MAINE, 41.]

CORPORATION CAN NOT COMMIT A CRIME OR MISDEMEANOR, nor by any positive or affirmative act, as a corporation, incite others to do so.

WHEN CRIME OR MISDEMEANOR IS COMMITTED UNDER COLOR OF CORPORATE AUTHORITY, the individuals, and not the corporation, should be indicted.

CORPORATION CAN NOT BE INDICTED FOR A NUISANCE for obstructing a navigable river; in such a case the remedy is against those persons by whose procurement the nuisance was erected.

INDICTMENT against the defendants for erecting a dam across the Penobscot river, thereby obstructing the passage of rafts. The court instructed the jury that the defendants, as a corporation, were indictable, if the obstructions had been erected by their procurement through their agents. Defendants excepted to this instruction, and the jury returning a verdict for plaintiff, this appeal was taken.

Rowe and Rogers, for the defendants.

Goodenow, attorney-general, contra.

By Court, WESTON, C. J. A corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor, by any positive or affirmative act, nor incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by a vote entered upon their records, require an agent to commit a battery; but if he does so, it can not be regarded as a corporate act, for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offense, thus incited by them, the innocent dissenting minority become equally amenable to punishment with the guilty majority. Such only as take part in the measure, should be prosecuted as individuals, either as principals, or as aiding and abetting or procuring an offense to be committed, according to its character or magnitude. It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor

is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted: Ang. & Ames on Corp. 396, sec. 9. We think it can not be doubted, that the erection of a public nuisance is a misdemeanor. There are cases, where *quasi* corporations are indictable for the neglect of duties imposed by law. Towns for instance, charged with the maintenance of the public highways, are by statute indictable, for any failure of duty in this respect. The corporation here attempted to be charged, have violated no duty imposed upon them by statute. Whatever has been done, was by the hand or procurement of individuals. They may be indicted and punished and the nuisance abated. We have been referred to no precedent where an indictment has been sustained against a corporation, upon such a charge; and in our opinion, the individuals concerned and not the corporation, must be held criminally answerable for what has been done.

Exceptions sustained.

LIABILITY OF CORPORATION FOR TORTS: See notes to *Riddle v. Proprietors*, 5 Am. Dec. 35, and *Orr v. Bank of United States*, 13 Id. 588. In *Whiteman's Ex'r v. Wilm. & Susq. R. R. Co.*, 33 Id. 411, it was held that trespass *vi et armis* could be maintained against a corporation aggregate.

SMALLWOOD v. NORTON.

[20 MAINE, 83.]

EMPLOYMENT OF AN ATTORNEY IS PROVED SUFFICIENTLY by his acting as such for the plaintiff and being recognized as acting in that capacity on the records of the court.

ATTORNEY SHOULD DEFEND AGAINST REPLEVIN PROCESS to recover goods seized on an attachment sued out by the attorney on a judgment obtained by him.

PLAINTIFF IN REPLEVIN BECOMING NONSUIT, the attorney for the attachment creditor should move for a judgment for a return of the property levied, and for a failure to do so, in consequence of which the claim is lost, the attorney is liable for negligence.

IN ACTION AGAINST ATTORNEY FOR NEGLIGENCE in failing to move for a judgment for a return of the property when the plaintiff in replevin has been nonsuited, the attorney can not show that the plaintiff in replevin was the real owner of the property.

ASSUMPSIT against defendants, attorneys-at-law, for negligence. In the winter of 1835, Richardson, the agent of the plaintiffs, sent a demand against one Kimball to the defendants for collection. Suit was instituted in February, 1835, and personal property of Kimball attached by Leavitt, a deputy sheriff.

This property was replevied by one Fiske. Both actions were entered at the May term, the defendants entering appearance both for Smallwood and for Leavitt in the replevin suit. In June defendants wrote to plaintiffs informing them of the commencement of the suit, and saying they would secure the plaintiffs' debt, as Fiske had no title. At the October term, Kimball was defaulted, judgment rendered against him, and execution issued in December following, but returned unsatisfied. In March, 1836, *alias* execution issued, but it did not appear that it was ever placed in the officer's hands. The replevin suit was continued to the January term, when Fiske was nonsuited. It appeared that the judgment of the court was not recorded, as no papers had been put on file before the middle of the vacation after rendition of judgment. No motion had been made by defendants for a return of the goods; or that the replevin writ should be placed on file; the defendants' names appeared as attorneys for Leavitt, and were brought forward on the subsequent dockets. It appeared that Leavitt employed Norton to defend the suit. The defendants offered to prove that the property attached belonged to Fitch, the plaintiff in the replevin suit, but the evidence was rejected. The court ruled in favor of the plaintiff, upon which a default was entered, subject to the opinion of the court; if the evidence should have been admitted, or if the plaintiff upon the facts is not entitled to recover, the judgment to be taken off and a nonsuit entered.

Cooley, for the defendants.

Hobbs, *contra*.

By Court, WESTON, C. J. Richardson acted as the agent of the plaintiff, and his testimony was admissible as such. The defendants were engaged as attorneys to prosecute and collect the plaintiff's debt. They were under legal obligation to discharge this duty with competent skill and fidelity. The object of the suit, instituted by them for the plaintiff, was to obtain judgment, and as the fruits of it, satisfaction of the execution, which issued. They had caused the debtor's property to be attached; and it was their duty by all legal means, to make that attachment available. They became professionally charged with all legal ancillary proceedings, necessary to make the attachment effectual: *Dearborn v. Dearborn*, 15 Mass. 316. With regard to the averment, that the defendants were employed, and undertook to act, as attorneys of the common pleas, it is sufficiently proved by their acting as such for the plaintiff, and being recognized as

acting in that capacity, on the records of that court. A process in replevin was instituted at the suit of David Fiske, to defeat the attachment, procured by the defendants, for the benefit of the plaintiff. That is necessarily brought against the officer, who acts in trust for the attaching creditor, although he has nominally the management of the defense. The plaintiff was the *cestui que trust*, and the defendants their attorneys. From this relation alone, they would have been received to defend the replevin. But one of the defendants was also retained by the officer. Such being the connection between these suits, the plaintiff having a direct interest to defeat the replevin, the object of which was to render his attachment unavailable, the defendants owed a duty to the plaintiff, in defending against the replevin process, as well as to the officer. That they so understood it, and assumed to act for the interest of the plaintiff in both suits, is apparent from their letter of June 20, 1835. But independent of that letter, it was their duty to take care of his interest. And they could not relieve themselves from this responsibility, by the employment or substitution of other counsel.

When the plaintiff in replevin became nonsuit, it was their duty to see that the writ was put on file, that the record might be duly made up. They should also have moved for judgment for a return of the property replevied. Without such a motion, no such judgment can be entered in cases of nonsuit, nor would in such case a failure to return be a breach of the replevin bond: *Badlam v. Tucker et al.*, 1 Pick. 284 [11 Am. Dec. 202]; *Pettygrove v. Hoyt et al.*, 2 Fairf. 66. If the defendants had fulfilled their professional duties to the plaintiff, by taking such measures as to render the replevin bond available, by the regular entry of judgment upon nonsuit, and for a return, in a suit on the bond, it would have been held forfeited, and the officer, in trust for the plaintiff, would have been entitled to judgment for the value of the property, as well as for the damages. Nor do we think, that proof could be received in a suit on the bond that the property was in Fiske. Judgment for return should be complied with in terms, or the obligors held liable to respond in damages. It would be against the legal effect of that judgment, to open the question of property in a suit on the bond. The time to have tried that question was, while the suit in replevin was pending. It would be a very extraordinary derangement of the regular course of legal proceedings to suffer the plaintiff in replevin to abandon a process, expressly provided to enable him to vindicate his title to property taken from the custody of the law, and sub-

sequently to try his rights, under the bond, which he is required to give to prosecute his replevin with effect. If such evidence would not be available in defense of the bond, it can not avail the defendants, for neglecting the proper legal steps to render the bond effectual, for the benefit of the plaintiff. But, aside from the question of title, he would have been entitled to the twelve per cent. which the officer would at all events have recovered for his use.

The liability of the defendants being sustained by the proof, we are satisfied, that under the general issue, a cause of action is sufficiently set forth in the second count. The default is to stand, and the case referred, for the assessment of damages, as has been agreed by the parties.

LIABILITY OF ATTORNEY FOR NEGLIGENCE AND WANT OF SKILL.—For a discussion of this subject see note to *Fitch v. Scott*, 34 Am. Dec. 86.

DENNISON v. THOMASTON MUTUAL INS. CO.

[20 MAINE, 125.]

WHERE POLICY REQUIRED INSURED TO STATE DISTANCE OF BUILDING insured from the neighboring buildings, an omission to mention buildings on another street, and from which there was no reasonable apprehension of danger, is not such a suppression of the truth as invalidates the policy, though the fire is communicated from them.

EXPRESSION OF AN OPINION NOT A MISREPRESENTATION, WHEN.—Where the insured, in answer to a question as to the locality of neighboring buildings, described certain sheds in conformity to the truth, but added that they "would not endanger the buildings if they should burn," this addition is but matter of opinion, and would not amount to a misrepresentation, if honestly made.

ACTION upon a policy of insurance. The policy contained a provision to the effect that the insured would not be entitled to any indemnification if any circumstance material to the risk be suppressed. It appears that two wooden buildings stood on the street back of the insured property. The fire arose in these, spread to some wooden sheds (mentioned in the policy), and thence to the insured buildings. The wooden buildings were not mentioned in the policy. The remaining facts necessary to a comprehension of the case appear from the opinion. Verdict for plaintiff subject to the opinion of the court; if entitled to recover, judgment to be entered on the verdict; and if entitled to interest from an earlier date than sixty days after affidavit furnished and notice annexed, verdict to be amended accordingly.

Preble, for the defendants.

Rogers and Cutting, for the plaintiff.

By Court, WHITMAN, C. J. A verdict was taken for the plaintiff subject to the opinion of the court, upon a report of the judge, before whom the trial was had, of the evidence, and rulings by him made in the progress of the trial. And it is agreed, that such judgment shall be entered, either upon the verdict or upon nonsuit, as the court may deem reasonable.

The action is upon a policy of insurance against fire, underwritten by the defendants, on the dwelling-house of the plaintiff, situated in Bangor, which was consumed by fire. The defendants for their defense, rely upon what they consider to have been a misrepresentation made at the time the policy was effected. The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words: "East side of the block are small one-story woodsheds, and would not endanger the buildings if they should burn." In evidence it appeared, that small sheds projected out from near the back part of the brick block of buildings (one of which was the house in question), twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage way in the rear of them, of fourteen feet wide, adjoining some two-story wooden buildings, standing on another street, forty-nine feet from the plaintiff's house, and in which the fire which consumed the plaintiff's house, originated. The first question, which arises, is, was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk? It does not seem to be necessary, in order to avail the defendants in their defense, that the misrepresentation or suppression of the truth should have been willful. If it were but an inadvertent omission, yet if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void.

In the case at bar it has now been rendered undeniable, that the burning of the two-story buildings, on another street, endangered the plaintiff's house; and to the interrogatory propounded it now would seem, that the existence of those buildings might with propriety, have been stated. But this does not prove, that, before the occurrence of the fire, it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occur-

rence, after a disaster has happened, that we can clearly discern that the cause, which may have produced it, would be likely to have such an effect, while, if no such disaster had occurred, we might have been very far from expecting it. In this case it is essential to determine whether the plaintiff was bound to have known that a fire originating in the two-story wooden buildings, would have endangered the burning of his house. If as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for, what a man ought to have known, he must be presumed to have known. This knowledge, in a case like the present, must have been something more than, that by possibility a fire so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to another, to the leeward of it. Any danger like this could not have been in contemplation, when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling, could have been in view by the defendants. And the question is, were the two-story wooden buildings of that description?

In reference to this question, it may not be unimportant to consider, that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend, in their behalf, to the applications for insurance from that quarter. It may be believed, that the selection of this individual was the result of knowledge, with regard to his intelligence and capacity for such purpose. It was not, however, his business, perhaps, to prepare representations to be made by applicants for insurance. But it did so happen, that he assisted the plaintiff in preparing the answers to the standing interrogatories, one of which is the interrogatory before named, intended to produce a representation upon which to found the estimates of the propriety of assuming the risks proposed. He, it seems, examined the premises, looked at the woodsheds, and the two-story wooden buildings beyond them. To him it did not seem to have occurred that the vicinity of those buildings was such as to render it necessary that the two-story wooden buildings should be named in answer to the interrogatory; for he, at the

request of the plaintiff, penned the reply thereto as he thought proper. It does not appear that any witness has testified, that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he can not be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate; and, in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less willfully.

As to the wooden sheds, they were named; and the description given of them is precisely in conformity to the truth. They were named, however, in connection with an opinion, that if they took fire, they would not endanger the house. There is, then, no misrepresentation with regard to their existence. The misrepresentation complained of, in reference to them, is merely in matter of opinion. But opinions, if honestly entertained, and honestly communicated, are not misrepresentations, however erroneous they may prove to be. That this opinion was uttered *bona fide*, and in perfect singleness of heart and purpose, may well be believed, and may fairly be deducible from the fact, that it was expressed in concurrence with the unquestionable belief at the time, of its correctness, by the confidential friend of the defendants. An opinion so uttered, if not in good faith, might well be complained of, as it might tend to throw the defendants off their guard. In such case, it might tend to show a fraudulent design; and in connection with evidence of misrepresentation of facts, even short of what otherwise might be necessary to vacate a contract, would be likely to have that effect.

But it is by no means clear, if the fire had not originated elsewhere than in the sheds, that it would have been attended with essential danger to the main building. The neighbors and firemen of the city, might be expected to be able to extinguish a fire so originating. Such buildings are easily pulled to pieces; and an engine brought to bear upon them would do great execution. It may therefore, even now, be very questionable, whether the opinion complained of may not be adopted as well founded to a very considerable extent at least. As to the testimony of the witnesses, touching the condition of the fire department and its exertions, and whatever relates thereto, we see

no ground from thence arising, to question the correctness of the finding of the jury. The most that can be said of that part of the evidence is, that it is irrelevant, and not of a tendency to influence a jury one way or the other.

We are of opinion, therefore, that judgment must be entered upon the verdict, with interest as agreed.

DESCRIPTION OF PROPERTY IN POLICY OF INSURANCE, MATERIALITY OF: See *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460, where this subject is fully discussed; also *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118; *Aetna Fire Ins. Co. v. Taylor*, Id. 90; *Strong v. Manufacturers' Ins. Co.*, 20 Id. 507.

GOODNOW v. HOWE.

[20 MAINE, 164.]

CREDITOR'S DISCOUNTING DRAFT SENT HIM BY DEBTOR and giving the latter credit before the draft is honored, will not conclude him in the absence of negligence or want of fidelity; and having taken up the draft after its dishonor, he is entitled to recover that amount from the debtor.

DEFENDANT being indebted to plaintiff, remitted to him a draft drawn by L. D. Shaw, payable to N. D. Shaw and indorsed by him, requesting plaintiff to credit him for it when paid. Plaintiff discounted the draft and credited defendant with the proceeds. It afterwards was protested by the bank for non-acceptance; and notices of this were given plaintiff, who forwarded them to defendant. At maturity the draft was protested for non-payment and was taken up by plaintiff, who inclosed it to Messrs. Hobbs, of Eastport, the defendant living in New Brunswick, requesting them to forward it to defendant; that Messrs. Hobbs returned the draft saying they had attempted to make a settlement with the drawer, but unavailingly, as he would not pay the damages; they also returned to plaintiff a new draft between the same parties for the same amount and costs of protest, but not for damages, telling plaintiff to retain either at his election and return the other. Plaintiff retained the old draft, and sent back the other to Messrs. Hobbs, and inclosed the protested draft to some one at Eastport. It did not appear that defendant ever received it. The evidence showed that defendant, on hearing of the plaintiff's taking the new draft, wrote to him approving of his course. Default to be entered for such sum as plaintiff is entitled to recover.

Hobbs, for the defendant.

D. T. Granger, contra.

By Court, WESTON, C. J. The draft in controversy was remitted by the defendant to the plaintiff, with a request, that when paid, it should be passed to his credit, he being indebted to the plaintiff. This imposed upon the latter reasonable fidelity, in discharge of his trust. He was liable to no other risk or hazard, in relation to the business. He put it in train for collection, by causing it to be discounted at the Union bank, at Boston. This did not increase the hazard to the defendant or to the parties to the draft. It enlisted the vigilance of the bank in the collection, they having great facilities, through their officers, and by their extensive correspondence. The defendant, when advised of what was done, made no objection; but in his letter of March 18, 1837, acknowledging the receipt of the notices, requested that the draft might be returned to him, that he might call on the indorser. If he had disapproved of the plaintiff's course, or claimed to hold him responsible for the draft, or any part of the damages or expense, he was required, upon the principles of fair dealing between merchants, so to have apprised him. The fact, that the plaintiff credited the defendant with the avails, before the draft had been honored, ought not to conclude him, unless chargeable with negligence, or a want of fidelity. And this is not imputable to him, from any evidence presented in the case. The banks and the notary were the usual and approved agents, proper to be employed in the discharge of the duty confided to him. Failing to realize the expectations of the defendant, he advises him of the result and forwards to him notices for the indorser and drawer, which were received and transmitted. It thereupon became the business of the defendant to resort to the parties for payment. Isaac Hobbs, the deponent, remitted a new draft to the plaintiff, which he was to retain or not, at his election; and of this the defendant approved. The plaintiff promptly returned the new draft. Having done his duty, and fully advised the defendant, if Neal D. Shaw, the indorser, was ready and willing to pay the amount of the draft, without the damages, it was for the defendant to decide, whether that proposition would be acceptable. We are not aware, that the plaintiff was bound to adjust the matter upon those terms.

Upon the whole, if any loss has been sustained, it does not appear to us, that it should fall upon the plaintiff. He was acting for the defendant, and faithfully discharged his duty. The defendant, as is fairly to be implied from his correspondence, was satisfied with what he had done. The plaintiff is justly en-

titled then to charge back the amount of the draft, and to add thereto the damages and expenses, by him actually paid; and judgment is to be made up accordingly.

DEBT, HOW FAR EXTINGUISHED BY GIVING NOTE OR ORDER.—Where a note or order is given by debtor for a pre-existing debt, it is presumed to be in payment of it: *Maneely v. McGee*, 4 Am. Dec. 105; *Thacher v. Dinsmore*, Id. 61; *Whitbeck v. Van Ness*, 6 Id. 383; *Varner v. Nobleborough*, 11 Id. 48; *Arnold v. Camp*, 7 Id. 328. And an acceptance of a note or order in satisfaction of a debt discharges it: *Apthorp v. Shepard*, 1 Id. 6; *Hutchins v. Olcott*, 24 Id. 634; *Harrison v. Hicks*, 27 Id. 638; *Glenn v. Smith*, 20 Id. 452; *Homes v. Smyth*, 33 Id. 650. But the note or bill must be expressly received as payment: *Barelli v. Brown*, 10 Id. 683; *Murray v. Gouverneur*, 1 Id. 177; *Patapasco Ins. Co. v. Smith*, 14 Id. 268; *Johnson v. Weed*, 6 Id. 279; *Muldon v. Whitlock*, 13 Id. 533; *Tobey v. Barber*, 4 Id. 326; otherwise it will not operate to extinguish the debt: *Pateshall v. Apthorp*, 1 Id. 3 (but see *Arnold v. Camp*, 7 Id. 328); *Patapasco Ins. Co. v. Smith*, 14 Id. 268; *Reed v. Van Ostrand*, 19 Id. 529; *Muldon v. Whitlock*, 13 Id. 533; *Clopper v. Union*, 16 Id. 294; *Hart v. Boller*, 16 Id. 536; *Costelo v. Cave*, 27 Id. 404.

DURHAM v. ALDEN.

[20 MAINE, 228.]

CONVEYANCE BY MORTGAGOR AND MORTGAGEE.—Where the mortgagee joins with the mortgagor in a deed conveying the mortgaged premises, together with a smaller parcel owned by the mortgagee in severalty, the deed containing a covenant that the premises are free from incumbrances, he will be estopped to assert his mortgage, the deed making no exception of it, and he not giving the purchaser notice that he claimed any title.

WRIT of entry to obtain judgment as on a mortgage. The following facts were agreed upon: Durham being the owner of a tract of land, conveyed seven eighths of it to one Morrill, and took a mortgage from Morrill to secure the unpaid purchase money. Afterwards, Morrill and Durham united in a deed conveying said tract to one Merrill, Morrill conveying seven eighths and Durham one eighth. The deed contained the following, among other covenants: "And we do covenant with the said Merrill, his heirs and assigns, that we are lawfully seised in fee of the aforegranted premises; that they are free of incumbrances." The deed in no way mentioned Durham's mortgage. Some months after, Durham, by consent of Morrill, entered upon the premises, for condition broken and to foreclose Morrill's right to redeem. Merrill, after the entry, deeded the land to the tenant. If, on the facts, the action can be maintained, judgment to be for demandant; if not, for the tenants, with costs; provided, however, if the court should think the demand-

ant's covenants should cover the said seven eighths, the judgment for tenant to be without costs.

Kelley, for the demandant.

Crosby, contra.

By Court, SHEPLEY, J. It appears from the agreed statement that the demandant as mortgagee in fee held the title to seven eighths, and had an indefeasible title to the other eighth of a tract of land, of which the demanded premises were a part. And that he united with his mortgagor in a deed conveying the premises to Daniel Merrill, from whom the tenants derived their title. By this deed the demandant conveyed one eighth and his mortgagor seven eighths with warranty. Admitting the covenants to be several, and not joint, the effect of this transaction is, that the demandant knowingly becomes a party to the most solemn assurance made by his mortgagor under his hand and seal, that the seven eighths "are free of all incumbrances" and that "he has good right to sell and convey the same." And he does this, while he held a mortgage covering the premises, on which was then due more than double the amount of the purchase money, without causing any exception of his own title to be introduced; and without giving any information to the purchaser that he claimed any title, or that the grantor's title was defective. Under such circumstances he is as much bound by the declarations of his mortgagor as if they were his own. It would be a fraud upon the purchaser to permit him now to disturb that title: *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Storrs v. Barker*, 6 Id. 166 [10 Am. Dec. 316]; 1 Story's Eq. 376; *Hatch v. Kimball*, 16 Me. 146. It would be no legal excuse, if done through ignorance or inattention, for it is more just that he should be the loser under such circumstances than that the innocent and faultless purchaser should.

Judgment for the tenants.

BAXTER v. BRADBURY.

[20 MAINE, 260.]

IN ACTION FOR BREACH OF COVENANT OF SEISIN the defendant may offer in evidence deeds to himself subsequent to his deed to plaintiff to defeat the action, as these deeds inure to the plaintiff by virtue of the general covenant of warranty in his deed.

WHERE PARTY ACQUIRES TITLE AFTER CONVEYANCE WITH GENERAL WARRANTY. AM. DEC. VOL. XXXVII—4

RANTY, the title thus acquired inures to the benefit of his grantee, and the grantee then has no right to elect whether or not to reject the title. **DAMAGES ARE NOMINAL**, THOUGH **WARRANTOR HAD NOT THE TITLE** when he made his conveyance, if before recovery against him he has obtained the title.

ESTATE IN FEE IS PRESUMED TO DESCEND ON DEATH OF ANCESTOR in pursuance of the laws of inheritance, unless the descent is shown to have been interrupted by a devise.

ACTION for breach of covenant of seisin in a deed of warranty, dated August 3, 1835. To prove breach plaintiff produced a deed of warranty from one Peck to Joy, dated July 27, 1799, of the premises in question. The defendant offered in evidence a deed of quitclaim from Amos Whitney to himself of one of the lots in question, and a warranty deed from Whitten of another lot. This evidence was rejected. A contract of Joy dated June, 1835, to convey other portions of the premises to the defendant, and a deed from Joy's heirs dated October 20, 1837, after the commencement of this suit, were also offered and rejected. By consent a default was entered and damages assessed at the amount of the consideration money and interest, subject to the opinion of the whole court; if the evidence was improperly rejected the default to be taken off and the case to stand for trial.

Appleton, for the defendant.

Rogers and Cooley, contra.

By Court, **WESTON, C. J.** It is assumed in argument, that Amos Whitney and Thomas Whitten were seised of the lands described in their respective deeds to the defendant, dated August 24, 1835. The lands constitute a part of that, which is the subject-matter of this suit. These deeds, with the evidence of their seisin, were rejected as inadmissible, by the presiding judge at the trial. If this evidence could legally have any effect upon the right of the plaintiff to recover, or upon the measure of damages, it ought not to have been rejected. The rules, which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for damage he has sustained. Thus if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser, the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants, usual in the conveyance of real estate, if there exist facts and circumstances, which would render the application of the rule inequitable, they are to be taken into consideration by a

jury: *Leland v. Stone*, 10 Mass. 459. The covenant was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken and he fails of that seisin, he has a right to reclaim the purchase money. But if in virtue of another covenant in the same deed, which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed besides to recover back the consideration paid for it. The rule as to the measure of damages for the breach of this covenant, which is just in its general application, could never be intended to apply to such a case. In *Whiting v. Davey*,¹ 15 Pick. 428, it is strongly intimated by the court, that this rule may have exceptions, as it undoubtedly has.

If Whitney and Whitten were seised, immediately upon the execution of their deeds, which were executed a few days after that, upon which the plaintiff declares, their seisin at once inured and passed to him, in virtue of the covenant of general warranty in his deed: *Somes v. Skinner*, 3 Pick. 52. It has been insisted by the counsel for the plaintiff that this effect depends upon the election of the grantee, and that the plaintiff here would reject the title arising by estoppel. But we are aware of no legal principle which can sustain this position. In the case last cited the court say, "that the general principle to be deduced from all the authorities is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor." The plaintiff, by taking a general covenant of warranty, not only assented to, but secured and made available to himself all the legal consequences resulting from that covenant. Having therefore, under his deed, before the commencement of the action, acquired the seisin, which it was the object of both covenants to secure, he could be entitled only to nominal damages, and in our judgment the evidence rejected was legally admissible. The estoppel, being part of the title, may be given in evidence, without being pleaded: *Adams v. Barnes*, 17 Mass. 365. Whether the seisin of Whitney and Whitten was defeasible or indefeasible, is not a question which can arise under this covenant, which operates only upon the actual seisin, and does not assure the paramount title. The same course of reasoning, and the same authorities, which justified the admis-

1. *Whiting v. Davey*.

sion of the testimony rejected, required that the evidence of title derived by estoppel from Joy's heirs, should have been received.

It has been objected, that these lands may have been devised by Joy, which may have prevented a descent to the heirs. But an estate in fee, upon the decease of the ancestor, is presumed to descend, in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise. By the conveyance from Joy's heirs to the defendant, the plaintiff acquired not only the seisin, but an indefeasible title. As, however, that was executed, since the commencement of the action, the plaintiff is entitled to nominal damages, and to nothing more, if he has not been disturbed in his possession; and judgment may be rendered for him, therefore, on the default, which has been entered. But if the actual seisin of Whitney and Whitten is intended to be contested, or the plaintiff would show that he had been dispossessed, before his title by estoppel attached, the default must be taken off, and the action stand for trial.

SUBSEQUENTLY ACQUIRED TITLE, EFFECT OF.—Where one sells and conveys land to which he has no title, but afterwards acquires title, his heirs will be estopped to deny the title in the grantee: *McWilliams v. Nisly*, 7 Am. Dec. 654. And a conveyance by an heir apparent estops him from recovering the property when it subsequently descends to him: *McPherson v. Cunliff*, 14 Id. 642. Though in *Allen v. Sayward*, 17 Id. 221, it was decided that covenants of lawful seisin and good right to convey did not estop the grantor from setting up an after-acquired title against the grantee. In *Morris v. Phelps*, 4 Id. 323, the court held that a defendant could not give in evidence a title by him subsequent to bringing the action for breach of covenant of seisin; that the rights of the parties must be determined as they were at the time the action was begun.

ROBERTS v. MARSTON.

[20 MAINE, 275.]

REMOVAL OF INCUMBRANCES NOT A CONDITION PRECEDENT, WHEN.—Where defendant agreed to remove certain incumbrances from premises conveyed to plaintiff by a certain day, in consideration thereof to be allowed a certain sum on a debt due plaintiff, the removal of the incumbrances by that day is not a condition precedent, and defendant not having removed the incumbrances till the day had passed, he is still entitled to set off the sum stipulated in an action by the plaintiff on the original indebtedness, the plaintiff not having reconveyed the premises to him.

WHERE PLAINTIFF HAS SUFFERED DAMAGES BY THE DELAY, in such a case, he has a right to have them deducted from the amount he agreed to allow for the premises.

ASSUMPSIT on several notes of hand amounting to five thousand five hundred dollars. The defendant introduced a receipt from the plaintiff by which plaintiff agreed to allow defendant four thousand dollars on the indebtedness, in consideration of a warranty deed to certain tracts of land, provided defendant removed incumbrances on the land by a certain day. Defendant did not remove the incumbrances till after the commencement of this action. Plaintiff contended that as the incumbrances were not removed by the day stipulated, defendant had no right of set-off. But the court ruled that as the plaintiff had not offered to reconvey the land to the defendant, the jury should set off such sum as the defendant was entitled to, making such deduction from the four thousand dollars as might be proper from a change in the value of the property. The jury disagreed, and the parties submitted to the court whether the defendant should be allowed anything or not on account of the receipt.

Rogers, for the plaintiff.

McCrillis, contra.

By Court, WESSTON, C. J. The plaintiff has received of the defendant a deed of warranty of certain real estate, for which it appears, by his receipt of December 20, 1836, he was to allow him four thousand dollars when he shall have cleared the incumbrances on the property. The defendant has removed the incumbrances; and his right to be allowed the stipulated sum would be perfect, but for a clause added to the receipt which is in these words: "which incumbrances are to be removed by him, on or before the first day of July next." The incumbrances were not removed on that day, nor until more than a year afterwards. And the argument is, on the part of the plaintiff, that by reason of the failure of the defendant to cause this to be done at the time appointed, he has now no claim to any allowance whatever, by way of offset. This construction would give to the clause, under consideration, the force of a condition precedent. No direct language is used, expressive of such a condition, nor is it deducible by necessary implication. The incumbrance was less than the stipulated price; and it would be unreasonable to subject the defendant to the hazard of a forfeiture of the estate, if he did not remove it at the time, unless such is the plain meaning of the terms used. Although the plaintiff was secured by the covenant in the deed, yet without the latter clause in the receipt, no definite time was fixed, within which the business was to be closed. The defendant, by accept-

ing the receipt, must be deemed to have assented to the stipulation. It is equivalent to an affirmative agreement on his part to that effect. It does not go to the whole consideration, and for that reason should not be regarded as a condition precedent: *Duke of St. Albans v. Shore*, Doug. 690, note; *Boone v. Eyre*, 1 H. Bl. 273, note; *Bennet v. Executors of Pixley*, 7 Johns. 249.

So far as the plaintiff has suffered damage from the delinquency of the defendant, he has a right to have it deducted from the price he agreed to give. He should be placed, by compensation, in the same condition, as if the defendant had fulfilled the stipulation. The jury were not able to agree before; and the matter is not so easily liquidated in a trial at law. Unless however the parties can arrange it between themselves, or by a submission to a reference, the action must stand for trial.

HIGGINS v. BROWN.

[20 MAINE, 332.]

WHERE PARTY SELLS PROPERTY CLAIMED BY ANOTHER and the proceeds are placed in the hands of a third person to abide a decision of their respective rights, and such party persuades the third person to pay him the sum he has received without the privity or consent of the other, he waives the benefit of any arrangement made with the third person, and becomes liable at once to the other party if he was the owner of the property, though no decision has been rendered nor demand made of the defendant.

ASSUMPSIT for money had and received. Defendant and Bridges made an arrangement by which Bridges cut and hauled to the wharf from defendant's land a quantity of wood. Defendant attempted to show that Bridges was to be paid a sum equal to one fourth of the value of the wood for his services, while plaintiff introduced evidence showing that one fourth of the wood hauled belonged to Bridges. Bridges sold his one fourth to the plaintiff. Defendant sold all the wood to the captain of a vessel; plaintiff forbid the captain removing his fourth; but the wood was all taken, and the captain paid one fourth of the proceeds into the hands of one Lake. Defendant persuaded Lake to pay to him this amount, he taking from defendant a bond of indemnity. Plaintiff then brought this suit. Defendant held that plaintiff had agreed that the money should remain with Lake to abide a decision as to the rights between himself and Bridges; that as no decision had been made, no one was liable to an action, unless Lake; that defendant was not liable

to an action without a demand. Plaintiff denied leaving the money in Lake's hands to abide a decision of his rights; contended that the agreement was between defendant and the captain solely, at the captain's request, to relieve the captain of the danger of paying twice; and that even had he assented to such agreement, the subsequent conduct of defendant in taking the money was such as to render him liable without any demand. The judge instructed the jury that if the wood was all the defendant's, and that Bridges was to receive one fourth of the proceeds, they should find for defendant; but that if one fourth of the wood was Bridges', they should find for plaintiff. That if the plaintiff was no party to the agreement with Lake, the plaintiff's right to recover would not be affected by the deposit; that even if he was a party to the agreement, and they were satisfied that defendant had voluntarily, and without the plaintiff's assent, procured the payment of the money to himself, plaintiff could maintain the action, though no decision had been made, and though no demand had been made upon defendant. Verdict for plaintiff; the defendant appealed.

Hathaway, for the defendant.

Pond, *contra*.

By Court, WESTON, C. J. The wood in controversy, the jury have found, was the property of Daniel Bridges, of whom the plaintiff purchased it. The defendant was fully apprised of this fact, having himself sold the wood to Bridges. It appears that he sold it a second time to a third person, and that he has actually received the proceeds. It is very clear, that he holds this money to the use of the plaintiff, to whom the wood belonged, and is liable to his action for it, unless the plaintiff's remedy has been suspended by the arrangement made with Lake, who received the money as a stakeholder. If this was done by the consent of the plaintiff, which is controverted, when the defendant persuaded Lake to pay to him the sum he had received without the privity or consent of the plaintiff, in violation of that arrangement, he must be considered as having waived the benefit of it, and he became at once answerable to the plaintiff, if he was in fact the owner of the wood.

Exceptions overruled.

SHEPLEY, J., absent.

ASSUMPSIT FOR MONEY HAD AND RECEIVED, WHEN LIES: See *Messier v. Amery*, 1 Am. Dec. 316; *Beardsley v. Root*, 6 Id. 386; *Kennedy v. Baltimore*

Ina. Co., Id. 499; *Goddard v. Bulow*, 9 Id. 663; *Dean v. Mason*, 10 Id. 162; *Andrews v. Baggs*, 12 Id. 47; *Ainslie v. Wilson*, 17 Id. 532; *Philipsen v. Bates*, 22 Id. 444; *O'Fallon v. Boismenu*, 28 Id. 678; *Dickins v. Jones*, 27 Id. 488; *Lime Rock Bank v. Plimpton*, 28 Id. 286; *McOrea v. Purmort*, 30 Id. 103; *Sergeant v. Stryker*, 32 Id. 404.

PARKER v. CUTLER MILLDAM CO.

[20 MAINE, 353.]

WHERE ACT AUTHORIZES CORPORATION TO ERECT DAM at the head of a harbor, the corporation may erect a dam there though it is below the highest point to which the tide usually flowed.

PROVISION IN ACT THAT CORPORATION MUST BUILD "ON THEIR OWN LAND" does not limit nor designate the place of building; its intent is to prevent any inference that the legislature intended to authorize the corporation to take the land of others for that purpose.

REGULATION OF NAVIGABLE WATERS WITHIN THE STATE is vested in the sovereign power, to be exercised by laws duly enacted.

WHERE DAM IS ERECTED ACROSS NAVIGABLE WATERS by a corporation under authority of an act of the legislature, the corporation is not liable to a riparian owner below for damages occasioned by altering the flux and reflux of the tide.

COLONIAL ORDINANCE OF 1641 EXTENDING RIGHT OF RIPARIAN PROPRIETOR in the soil from high to low-water mark, where it did not exceed one hundred rods, did not grant away any of the public right of fishery.

CASE for injury to plaintiff's water rights by erection of a dam by the defendant. Plea, the general issue. Plaintiff proved that defendant erected a dam across the channel at the head of Little River harbor, where the tide ebbed and flowed; that thereby the water was raised higher upon the plaintiff's beach, and though no part of his land was overflowed, his right of navigation and the right of fishermen to dig for clams on his flats were interfered with. The defendants claimed they had the right to erect the dam in question by authority of an act of the legislature entitled "An act to incorporate the Cutler milldam company." The judge instructed the jury that if they found plaintiff had sustained damage by the erection of the dam, they should award him such damages less the benefit he had received by reason of the erection. Jury found for plaintiff. The verdict is to stand, be amended, or set aside, according to the opinion of the court.

Thacher, for the defendant.

J. Granger, for the plaintiff.

By Court, SHEPLEY, J. This corporation was created by the act approved March 16, 1836: Spec. Laws, c. 123; and was "em-

powered to erect, maintain, repair, and rebuild, a mill-dam on their own land across the head of Little River harbor in the town of Cutler, with flood-gates thereto at least fifteen feet wide so as to admit the passage of gondolas and boats at high water." The counsel for the plaintiff contends, that the act did not authorize the corporation to build the dam below the highest point to which the tide usually flowed. The gates were to be constructed for the purpose of admitting gondolas and boats to pass through the dam at high water. The corporation is authorized to "use the water retained by said dam," which is to be built across, not above, the head of the harbor. This language exhibits an intention to permit the dam to be built in such a manner as to allow the corporation to retain and use the tide water. And the fact, that there is no natural fall in the river near that place, would tend to remove all doubts respecting the design of the act. It is said, that the place of building was limited and nearly designated by that part of the act, which requires it to be built on their own land. The first section authorizes the corporation to take and hold real estate, but it would own no land until a purchase had been made. It is the body corporate, not the corporators, that is authorized to build "on their own land." The provision must therefore have been inserted for some other purpose than to designate the place of building. It probably was to prevent any inference, that the legislature intended to authorize the corporation to take the land of others for that purpose. The corporation is proved to have been in possession of the dam and mills, and of the lands on which they were erected, and that is sufficient evidence of title for this defense.

The regulation of the navigable waters within the state is vested in the sovereign power, to be exercised by laws duly enacted. The navigation may be impeded, if in the judgment of that power the public good requires it. And if the more apparent object be the profit of a grantee, it is its right and duty to determine whether the public interest be so connected with it as to authorize the grant. To refuse it this right, would be to prevent the union of public and private interests for the accomplishment of any object. The jury have found that the dam was erected across the head of Little River harbor; the corporation is not therefore liable for any injury which the plaintiff may have suffered by obstructions to the navigation, by altering the flux and reflux of the tide. This will embrace the flowing of the beach complained of as an injury to the plaintiff in repairing vessels; the alleged injury to his mill-site by retaining the tide

water; and the increased difficulty in navigating the river occasioned by the flood gates.

In rivers where the tide ebbs and flows, as well as in the sea, the right of taking fish is common to all the citizens: *Warren v. Mathews*, 1 Salk. 357; *Ward v. Creswell*, Willes, 265; *Carter v. Murcot*, 4 Burr. 2162. And in *Bagott v. Orr*, 2 Bos. & Pul. 472, this right was decided to extend to the taking of shell-fish on the shore of a navigable river. The colonial ordinance of 1641 extended the right of the riparian proprietor in the soil from high to low-water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to interrupt the rights of the public, as secured by the ordinance. The right of navigation was expressly reserved. And the right of each householder to have free fishing, so far as the sea ebbs and flows, had been in the same ordinance declared. It was the policy of the colonial legislatures, instead of granting away any portion of the public right of fishery, to extend and enlarge it. Hence the claim and appropriation to public use of that which by the common law was private property, the fishery in rivers where the tide does not ebb and flow. It can not readily be admitted, under such a state of legislation, to have been the intention of the legislature by that ordinance to part with any of the public rights of fishery. The right to fish in waters where the soil was private property, having been appropriated and secured to the public, a grant of the soil in navigable waters to an individual could not have been regarded as putting him in possession of greater rights than he would have had by owning it without such grant. And it would be a strange construction to consider the right of fishery as granted away indirectly by another part of the same ordinance, which declared it.

The testimony in this case does not prove any appropriation of the clam fishery to private use. The witnesses speak of the fishermen generally, and not of the owners of the flats, as taking them for bait. The case does not show any such injury as will authorize the plaintiff to maintain the suit. It is not therefore necessary to examine the principles upon which the damages were assessed.

Verdict set aside.

OWNERSHIP OF NAVIGABLE RIVERS—RIGHT OF NAVIGATION.—The ownership of navigable rivers is in the people: *Home v. Richards*, 2 Am. Dec. 574; *Arnold v. Mundy*, 10 Id. 356; *Rogers v. Jones*, 19 Id. 493; *Lansing v. Smith*, 21 Id. 89; *Hollister v. Union Co.*, 25 Id. 36; *Mayor of Mobile v. Eslava*, 33

Id. 325. And the right to navigate public waters and to fish therein is in the public at large: *Lansing v. Smith*, 21 Id. 89. This right however is subject to legislative control: *Hooker v. Cummings*, 11 Id. 249; *Lansing v. Smith*, 21 Id. 89; *Attorney-general v. Stevens*, 22 Id. 526.

RIGHT OF FISHERY IN NAVIGABLE RIVER is common to all subject to legislative regulations: *Carson v. Blazer*, 4 Am. Dec. 463; *Commonwealth v. Chapin*, 16 Id. 386; *Lansing v. Smith*, 21 Id. 89; and is not affected by a grant of land from the state, including a navigable river: *Browne v. Kennedy*, 9 Id. 503. The principal case was cited to the point that as regards a right of fishing, the law makes no difference between shell-fish and swimming or floating fish, in *Weston v. Sampson*, 8 Cush. 355.

PORTER v. FOSTER

[20 MAINE, 391.]

WHERE PARTY IS IGNORANT OF TITLE OF THIRD PERSON at the time he enters into a contract of exchange, but is afterwards informed of it, and then continues to claim and use the article exchanged, he is guilty of conversion, and an action of trover may be maintained against him without a demand.

NEGLIGENCE OF PARTY TO PROCEED against one who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitations interposes.

TROVER. Plaintiff sold one Gardner a horse, and received therefor his promissory note payable in eight months. As security for the note, Gardner conveyed back the horse to the plaintiff, but he (Gardner) was to have the use of it until the time of payment. Gardner afterwards conveyed the horse to defendant, who was ignorant at the time of the claim of plaintiff, but was informed of it before the expiration of the eight months; he continued to use the horse after the expiration of that time and before the commencement of this suit. He knew the note had not been paid. There was no proof of any demand. The defendant requested the court to instruct the jury that a demand before bringing the action was necessary, and that if the plaintiff had had a lien on the horse it was lost by his negligence. These instructions were refused and defendant filed exceptions.

D. T. Granger, for the defendant.

Porter and Thacher, contra.

By Court, SHEPLEY, J. The contract between the plaintiff and Gardner secured to the latter the right to keep and use the horse, until his note became due, but no longer. His neglect to pay at that time would put an end to these rights; and the exercise

of acts of ownership would be without right and unlawful. He could not convey to the defendant greater rights or place him in a position more favorable than his own. The defendant, though ignorant of the title of the plaintiff at the time of his trade with Gardner, was informed of it, before the note became due, and continued, after he knew that it was not paid at maturity, to claim and use the horse. Being no longer able to make out a justification of these acts, they amounted to a conversion, as decided in *Galvin v. Bacon*, 2 Fairf. 28 [25 Am. Dec. 258]. The case of *Vincent v. Cornell*, 13 Pick. 294 [23 Am. Dec. 683], cited for the defendant, differs from this case. In that the defendant had parted with the possession, and did not exercise any act of ownership or control after the plaintiff became legally entitled to possession. In this, when the defendant was in the unlawful use, and when the action was commenced he had the right of property and the right to possession. The neglect of a party to proceed against one, who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitations interposes. The other point made at the trial was not insisted upon here.

Exceptions overruled.

CONVERSION, WHAT IS: See note to *Hale v. Ames*, 15 Am. Dec. 150; also, *Dowd v. Wadsworth*, 18 Id. 567; *Miller v. Plumb*, 16 Id. 456; *Woodbury v. Long*, 19 Id. 345; *Sanborn v. Colman*, 23 Id. 703; *Baker v. Wheeler*, 24 Id. 66; *Fletcher v. Fletcher*, 28 Id. 359; *Graham v. Warner*, Id. 65; *Dent v. Chiles*, 26 Id. 350; *Irish v. Cloyes*, 30 Id. 446; *Houston v. Dyche*, 33 Id. 130.

DEMAND, HOW FAR NECESSARY IN ACTION OF TROVER: See note to *Pierce v. Benjamin*, 25 Am. Dec. 400; also, *Jewett v. Patridge*, 28 Id. 173; *Houston v. Dyche*, 33 Id. 130.

WAKEFIELD v. CAMPBELL.

[20 MAINE, 393.]

WHERE EXECUTOR UNDER LICENSE FROM COURT to sell real estate for the payment of debts, sells a greater quantity than is authorized by the license, the sale is invalid.

WRIT of entry. Demandant claimed under a deed from one Farnsworth, administrator of the estate of Small, to himself. Demandant showed that Farnsworth was duly appointed by the probate court, and that he had been empowered by the court to sell real estate sufficient to raise one hundred and eighty-five dollars in payment of the decedent's debts, and in pursuance of this license had sold him the premises in question for two hun-

dred dollars. The counsel for the tenant contended that this sale was void as being in excess of the license; as the administrator had power to sell only so much real estate as would produce one hundred and eighty-five dollars. The judge ruled the sale to be void and a nonsuit was granted.

Burbank, for the demandant.

Hobbs, *contra*.

By Court, EMERY, J. The plaintiff insists, that the defendants, having no title, but coming in as trespassers, they can not be allowed to dispute the title of the plaintiff in this case. That as the administrator acted in good faith, the deed is not void, because the land was sold for a greater sum than he was licensed to raise. The defendants rely on the case of *Adams v. Morrison*, 4 N. H. 167 [17 Am. Dec. 406]; *Litchfield v. Cudworth*, 15 Pick. 23; Com. Dig., Power, C. 6, as decisive of the case in their favor. The case in New Hampshire was one where a posthumous child was demanding his portion of his father's estate. And the doctrine of the court was, that if one, under license to raise a particular sum, sells and conveys an entire tract of land for an entire sum of money, exceeding in amount the sum authorized by the license to be raised, the whole sale is void, because the act is entire and there is no way to ascertain what portion of the land he had authority to convey, and what not. When separate tracts are sold for distinct prices, the law is otherwise. One may be legal and the other not so. And the following cases are cited by the court: *Jenkins v. Keymis*, 1 Lev. 150; *Batty v. Carswell*, 2 Johns. 48; *Whitlock's case*, 8 Co. 138.¹

The case *Litchfield v. Cudworth*, 15 Pick. 23, was a claim of land by an execution creditor of an heir, by a levy in part, and countenances the idea that "although trustees, who have power to sell, can never by direct or indirect means become purchasers of the trust property, yet these principles do not render the sale absolutely void." It is an abuse of authority which may be taken advantage of by any one whose interest is affected, that is, *cestuis que trust* and all for whom the agent acted have an option to avoid the sale and retain the property, or to confirm the sale and receive the consideration, as may be for their interest. And the court says an administrator without license from a competent court, has no power to sell the real estate of his intestate. He is bound strictly to execute "the authority given him, and a deed by him not given in pursuance of his authority

would have no more operation to pass the estate of his intestate, than a deed made by a stranger. If under an authority to sell a part, he sells the whole, the act is unauthorized and void. He was licensed to sell to the amount of six hundred and forty dollars, and he sold the whole estate for nine hundred and fifty-three dollars and thirty-three cents. It must be wholly valid or wholly invalid. How can it be apportioned? Who shall determine what part, and how much the purchaser, and which, and how much the heir shall hold? And further, that a conveyance by one heir, and commencement of suit by his assignee for the land, is a sufficient avoidance of the administrator's sale." The case of *Adams v. Morrison*, 4 N. H. 167 [17 Am. Dec. 406], was cited by the demandant's counsel, but no allusion is made to that case by the justice in Massachusetts who delivered the opinion of the court. The questions by him propounded seem to be made in the conviction that it is impossible that they should be answered, except in a way to sustain the conclusion to which the judge arrived.

That there is a difficulty attending a different view, is readily admitted. Yet it would seem to be very essential to the speedy settlement of estates that as far as practicable, in conformity with rules of law, it should be a primary object of the courts to sustain the doings of administrators. It is a principle in equity to consider that the execution of a power in a way exceeding the authority, is void only for the excess, and good for the residue, if the bounds can be clearly ascertained. And if there be cases in which the bounds may fairly be ascertained, as it is granted there may, if two pieces of land be sold for distinct prices; may it not also be discovered when the sale is made at so much per acre? And would there be any insuperable difficulty in considering the heir as interested in common with the purchaser in so many acres as the price may show were unwarrantably conveyed? If there be any case then in which injustice may be prevented, by separating the good from the bad, in case of a sale for too great an amount, is it not going too far at once to denounce the whole as void merely because the sale is made for a greater sum than was needed?

May not cases occur where a fair opportunity for a sale may exist, and very near or quite the full value is offered, which may exceed the amount for which the license is given, a few dollars, as in the present case, and yet if the bargain be not then completed, the like advantageous proposal may not happen again? A new license may be obtained, perhaps, to sell the whole.

Additional expense must then be incurred, and possibly, no so good offer be had, and an essential injury is done to all concerned. May it not deserve consideration, whether, in contemplating the whole operation of our probate system, as to the administration of estates, and our statutes of limitation, a more liberal construction as to the execution of the powers of executors and administrators be not strongly urged upon courts? Though an administrator has no direct interest in the soil as administrator, yet at present he is bound to inventory real estate, has a right to the rents and profits, and if licensed to sell, by the bond which he gives, he is placed in such a predicament as to be holden for any excess which he may obtain, if the heirs see fit to call him to account. The truth is, much of the doctrine of strictness as to the execution of powers, is the result of construction made upon the peculiarities of English conveyances, which are devised to uphold family settlements, raise jointures, and make provision for children. It is professed, that they would guard against perpetuities; yet their practice was to give powers for leasing for years or for lives, and trammeling the subject with nice qualifications and with powers of revocation.

Powers were originally in their nature equitable, but are by the statute of uses transferred to common law: 2 Burr. 1147.¹ There are there two kinds of settlement; one by which the issue of the person to whom the first limitation is made, shall certainly take, by giving the first taker only an estate for life. The other, by creating an estate tail in the first instance. But then, Lord Mansfield says, "That is a trick in law, by which, when the issue arrive at twenty-one, the entail may be barred; and there is a trick against that, to make a strict settlement." And he asks, "What is the use of powers? It implies a strict settlement with power to make jointures, leases, and raise portions." *Doe ex dem. Duke of Devonshire and Duke and Duchess of Portland v. Lord George Cavendish*, 4 T. R. 741, in note. It is not necessary for us to resort to tricks for the purpose of effecting the settlement of estates. But we are not to misapply, arbitrarily, maxims which the changes of circumstances and law have made less appropriate to the present subject than formerly.

It is a sort of axiom, that naked powers, unaccompanied by any interest, are to be construed strictly. And the case cited, *Batty v. Carswell*, 2 Johns. 48, is an instance. Where A. authorized B. to sign his name to a certain note for a certain sum, payable in six months, and B. puts A.'s name to a note for that

1. *Zouch v. Woolston*.

sum payable in sixty days, A. would not be liable. There are powers given to donees of particular estates, to be construed strictly in favor of remainder-men, and yet liberally enough to make provision for a posthumous child, though the terms were, "who should be living at his death:" *Beale v. Beale*, 1 P. Wms. 244. And an eldest daughter, though first born, when there is a son, has often been ruled to be as a younger child. There are powers reserved by the donor for the benefit of himself, or of his heir, who would have been entitled to the fee, if it had not been limited by the donor's act. These have received a liberal construction. No power can be so framed as to protect an appointment under it, from payment of the debts of the person appointing: 2 Ves. 640.¹

It may not be amiss to observe, that the two leading cases cited in the case *Adams v. Morrison*, 4 N. H. 167 [17 Am. Dec. 406], *Whitlock's case*, 8 Co. 138, as there stated, and the case of *Jenkins v. Keymis*, are both cases arising on the construction of powers such as have before been spoken of. Lord Mansfield, in *Zouch ex dem. Woolston v. Woolston et al.*, 2 Burr. 1136, asserted, that whatever is an equitable ought to be deemed a legal execution of a power. He further said that in some of the early cases, they reasoned in courts of law, upon these equitable powers from notions applicable to naked authorities, unconnected with any interest, or to mere legal powers introduced by other statutes, instead of adopting the liberality of courts of equity; and considering these powers brought into the common law by the statute of uses, merely as a mode of ownership or property. And Justice Wilmot said that "courts of law ought to concur in supporting the execution of these powers, and ought not to listen to nice distinctions that savor of the sophistry of the schools; but to be guided by true good sense and manly reason." The state of New York has legislated extensively on this intricate subject; Maine has not.

The principle on which our system proceeds is, that real estate shall be a fund for the payment of debts if necessary, that the administrator may sell on license. If he sell, and in the performance of his duty, commit errors, which might be fatal, if taken advantage of in season, yet if the heirs omit to seek their redress in five years, by our statute, c. 52, sec. 12, they are barred: *Beal et al. v. Nason*, 14 Me. 344. And this limitation is made for the purpose of expediting the settlement of estates and quieting purchasers. Whether the persons subjected

1. *Alexander v. Alexander*.

to injury from the misconduct of the administrator have redress on his bond, they can ascertain, if they choose, by action. And in New York, it has been decided that strangers to the title are not to take advantage of this objection: *Jackson v. Dalfsen*,¹ 5 Johns. 43. In the present case, five years have not elapsed. The heirs may never claim, creditors could not, if they have received their dues from the administrator.

Notwithstanding these suggestions and views, which have arisen in examining the decisions to which our attention has been directed, yet considering that the matter under discussion is a real action, in which the plaintiff is to prevail by the strength of his own title, if he fail to exhibit a *prima facie* good title in his opening, it is his misfortune, and he must bear the consequences of his failure. Our courts have jealously watched the proceedings of administrators on sales of real estate under license. They have been holden to a strict compliance with the requisitions of law in such cases. And if the sale be made of a greater quantity than authorized by the license, when it is ascertained only by the price, and that is greater than the amount for which the license is given, the sale has been deemed invalid. We do not feel at liberty to overrule the decisions. We can not but perceive the great difficulty which might arise from countenancing a departure from the rule so often enforced. By the plaintiff's own showing, the sale was for too large a sum not warranted by the license. And at the time the nonsuit was ordered, it was so ordered in conformity with the law.

The exceptions must therefore be overruled.

ADMINISTRATOR'S SALE, WHEN VOID BECAUSE IN EXCESS OF ORDER OF SALE. But very few cases have arisen involving this subject. In the decisions turning on the validity of administration sales, the questions generally have been whether the administrator proceeded correctly in obtaining the order of sale, or whether, having obtained the order, the premises have not been sold for an inadequate consideration. The order generally designates what property shall be sold, and but slight discretion being given to the administrator, sales of an excess are of rare occurrence. Those that have been brought before the court have been where the order was to sell real estate sufficient to raise a certain sum of money. In those cases which have arisen, it has been held, where an administrator sells more real estate than he is authorized to sell by the order of the court, that such sale is void. Thus where executors were empowered to raise one hundred and seventy-four dollars and ninety-nine cents, and sold and granted by deed estate to the amount of one hundred and eighty-eight dollars, the proceedings were held void: *Lockwood v. Sturdevant*, 6 Conn. 373. And where an executor or administrator acting under a license from the judge of probate authorizing him to raise a particular sum by the sale of real estate, sells and conveys an entire tract for an entire sum of

1. *Jackson v. Van Dalfsen*.

money exceeding in amount the sum authorized to be raised, the sale is void: *Adams v. Morrison*, 4 N. H. 166; S. C., 17 Am. Dec. 406. The court said: "The reason of this is obvious. His [the executor's] doings are valid so far as he acts in pursuance of the license, and no farther. When he goes beyond his authority his acts are void." In *Litchfield v. Cudworth*, 15 Pick. 23, an administrator was licensed to sell real estate of his intestate for the payment of debts to the amount of six hundred and forty dollars, and he sold all the real estate, consisting of several parcels, for nine hundred and fifty-three dollars and thirty-three cents. The sale was held void. The court in delivering its opinion said: "An administrator without a license from a competent court, has no power to sell the real estate of his intestate. His authority is derived wholly from the decree of the court. The court has a discretion. He has none. He is bound strictly to execute the authority given him. And a deed by him, not given in pursuance of his authority, would have no more operation to pass the estate of his intestate than a deed made by a stranger, or his own deed of a stranger's land. If under authority to sell a part, he sells the whole, the act is unauthorized and void."

In the cases which have arisen some attempt was made to establish the rule that the sale should be void for the excess only, but this view was not favored, and the courts have held the whole sale void: *Litchfield v. Cudworth*, 15 Pick. 23; *Lockwood v. Sturdevant*, 6 Conn. 373; *Adams v. Morrison*, 4 N. H. 166; S. C., 17 Am. Dec. 406. In the last case the executor had sold an entire tract for an entire sum. The court said: "As in such a case the act is entire, and there is no way to ascertain what portion of the land he had authority to convey, and what not, the whole conveyance is necessarily pronounced to be void." And in *Litchfield v. Cudworth*, Morton, J., said: "How can it be apportioned? Who shall determine which part and how much the purchaser and which and how much the heirs shall hold."

DICKY v. LINSOTT.

[20 MAINE, 453.]

CONTRACTS FOR PERFORMANCE OF PERSONAL MANUAL LABOR, requiring health and strength, are subject to the implied condition that health and strength remain.

WHERE PARTY MAKING CONTRACT FOR PERFORMANCE OF TERM OF WORK is prevented from entering on the work at the stipulated time by an act of God, and the disability thus produced lasts during the greater portion of the term, he will be excused from performing the work during the remainder of the term.

ASSUMPSIT from eastern district court, Chandler, J., presiding. Plaintiff alleged and attempted to prove that defendant agreed to work for him for seven months, beginning at a stipulated time; that defendant did not come at the time stipulated, or at all, to perform the work. The defendant denied that the contract was completed, and said that it was merely talked of; he also showed that at the beginning of the term and through the greater portion of it he was not able to work on account of sickness. There was evidence proving that at about the beginning of the term,

defendant set out to work for the plaintiff, but being informed that plaintiff had hired another man, he did not go, but sent word to plaintiff that if he would send to Palermo, his residence, he (the defendant) would work for him, provided he had not hired some one else. Plaintiff went, but defendant, not being able to work, offered to hire another man, if plaintiff would secure his wages; this plaintiff refused to do. Defendant recovered towards the end of the term and went to work for somebody else. Plaintiff's counsel requested the court to instruct the jury that though defendant was prevented from working by the act of God, nevertheless the plaintiff was entitled to damages for his fruitless journey to Palermo; that it was defendant's duty to offer to work as soon as he recovered his health, and by neglecting to do so, his sickness during a portion of the time did not bar this action; that defendant should have given notice of his inability to work. The court, however, instructed the jury that if they believed the contract had been completed, the plaintiff would be entitled to damages, unless defendant was prevented from working by an act of God; that to the extent of that disability he would be excused from performance. Verdict for defendant. Plaintiff filed exceptions.

W. G. Crosby, for the plaintiff.

W. Kelly, contra.

By Court, WESTON, C. J. It is contended that the sickness of the defendant, which was the act of God, and his consequent inability to fulfill his contract, does not defeat the right of the plaintiff to recover damages for the breach. Cases have been cited where, upon express covenants, the performance of which had become impossible, without any fault in the covenantors, they were nevertheless held answerable in damages. These were doubtless all justified under their peculiar circumstances. But in a contract for the performance of personal manual labor, requiring health and strength, we think it must be understood to be subject to the implied condition, that health and strength remain. If by the act of God one half or three fourths of the strength of the contracting party is taken away, performance to the extent of his remaining ability would be hardly thought to entitle him to the compensation for which he may have stipulated while an able-bodied man. There may be cases where the hazard of health is assumed by the employer. This might be regulated by known and settled usage. Generally, however, the right to wages depends upon the actual performance of

labor. On the other hand, it is not expected that the laboring party should be subjected to any other loss where his inability arises from the visitation of Providence.

The judge instructed the jury, that this would excuse performance; and it does not appear, that the counsel for the plaintiff contended at the trial for any other doctrine. He insisted, however, that he was entitled to damage, for his fruitless journey to Palermo, on the invitation of the defendant. It is a sufficient answer to this claim, if otherwise available, that it is not sued for in this action. It seems from the evidence, that the defendant might have labored a month or two the latter part of the stipulated period. But the contract was entire, beginning at a time when the days are shortest, and covering principally the season when the earth can not be cultivated. The wages were to be at a certain monthly rate. The contract failing without the fault of the defendant, it would be neither just nor equitable to hold him obliged to labor for the plaintiff, at the monthly wages stipulated, when the days were longest, and labor in husbandry most valuable. The plaintiff was not obliged to accept such a partial performance. He had a right to secure the services of another man, and might have had as many laborers as it was for his interest to employ. And in our judgment, the court below was justified in withholding the instructions requested.

Exceptions overruled.

ACT OF GOD OR INEVITABLE ACCIDENT EXCUSES NON-PERFORMANCE of a covenant, when performance is rendered impossible, or such inevitable accident evidently was not in the contemplation of the parties, provided against by the general covenant: *Singleton v. Carroll*, 22 Am. Dec. 95. The principal case was referred to with approval in *Leopold v. Salkey*, 89 Ill. 420.

CHICK v. TREVETT.

[20 MAINE, 462.]

LEGAL CONSIDERATION, WHAT SUFFICIENT.—A loss or damage to the promisee is as good a legal consideration to support a note, as a benefit to the promisor.

TRUSTEES OF VOLUNTARY ASSOCIATION ARE LIABLE ON NOTE given by them for labor done for the association; and the non-joinder of the other members of the association should be taken advantage of by abatement.

ASSUMPSIT from the eastern district court, Chandler, J., presiding. Trevett and many others voluntarily associated together for the purpose of erecting a parsonage house. They were not incorporated. Trevett and two others gave plaintiff a promissory

note for services performed on the house, and signed it "Trustees of said house." Plaintiff brought an action against the three on this note. The court held the action maintainable, and defendant appealed.

Kelly, for the plaintiff.

Pierce, *contra*.

By Court, WESTON, C. J. One objection taken to the liability of the defendants on the note, is the alleged want of consideration. It is not necessary that this should inure to their benefit. A loss or damage to the promisee, is as good a legal consideration, as a benefit to the promisor. They promised to pay the plaintiff, for labor performed or to be performed, for the association. This was a loss to the plaintiff amply sufficient to sustain their promise, if they had not been members of the association. It is further insisted, that as they signed as trustees, their personal liability is excluded. If this designation indicates a mere agency, and they had authority from their principals, they are not personally bound. And if in such case, they had acted without authority, the apt remedy would have been an action on the case: *Ballou v. Talbot*, 16 Mass. 461 [8 Am. Dec. 146]. But the use of the term, trustees, indicates rather that the legal interest is in them, than that they act as mere agents. And if it is to be understood, that they represented a body of men who had voluntarily associated to build a meeting-house, the case finds, that the defendants were members of that body. In such case, they are properly made defendants, if the other members of the association might also have been joined. If they would have taken advantage of this objection, they should have pleaded in abatement.

Exceptions overruled.

LEGAL CONSIDERATION, WHAT SUFFICIENT.—A benefit to the promisor or an injury or inconvenience to the promisee, is a legal consideration: *Fisher v. Bartlett*, 22 Am. Dec. 225; *Hind v. Holdship*, 26 Id. 107.

PERSONAL LIABILITY OF TRUSTEES ON NOTE: See note to *Thacher v. Dinmore*, 4 Am. Dec. 63. Trustees of a corporation who executed a promissory note, to which they signed their several names as trustees and affixed their individual seals, were held liable personally: *McClure v. Bennett*, 12 Id. 223. See also *Barker v. Mechanics' Ins. Co.*, 20 Id. 664. In *Powers v. Briggs*, 79 Ill. 493, the facts were similar to those in the principal case and the trustees were held liable. The court referred approvingly to the principal case.

NON-JOINDER OF PROPER PARTIES is matter for plea in abatement: *Wheelwright v. Depeyster*, 3 Am. Dec. 345; *Robertson v. Smith*, 9 Id. 227; *Bell v. Layman*, 15 Id. 83; *Le Page v. McCrea*, 19 Id. 469; *Gilbert v. Dickerson*, 22 Id. 592; *Jones v. Parker*, 24 Id. 718; *Hilliker v. Loop*, 26 Id. 286.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

WYMAN v. RAE.

[11 GILL AND JOHNSON, 416.]

TAKING NOTE FOR GOODS SOLD AND DELIVERED does not extinguish the original cause of action.

WHERE NOTE HAS BEEN GIVEN, ITS PRODUCTION IS GENERALLY REQUIRED in an action on the original cause, for the security of the defendant, and not from any rule of evidence which would prevent the introduction of evidence of indebtedness without the production of the note.

EVIDENCE OF INDEBTEDNESS WITHOUT PRODUCTION OF NOTE is admissible in such a case.

PROMISSORY NOTES ARE NOT PRESUMED TO BE MADE ON TIME.

WHERE PARTY IS NOT BOUND TO PRODUCE PROMISSORY NOTE, evidence offered with a view to account for its non-production is unnecessary and inadmissible.

APPEAL from the Baltimore county court. Wyman & Co., on the strength of certain representations of the defendant, sold the defendant's sons a bill of goods. The bill not being paid, this action of trespass on the case was brought. On the trial it appeared that certain notes had been given by Rae's sons for the goods; but it did not appear whether the notes were payable on demand or otherwise. Defendant objected to evidence of indebtedness until the notes were produced, or until their non-production was legally accounted for. The court sustained the objection; the defendant excepted. This constitutes the first bill of exceptions. Plaintiffs then offered evidence to account for the non-production of the notes, to which defendant objected. The court sustained the objection, and plaintiff excepted. This constitutes the second bill of exceptions.

Latrobe, for the appellants.

Nelson, for the appellee.

By Court, ARCHER, J. The taking of a note for goods sold and delivered, certainly does not extinguish the original cause of action. An action on the common counts may be sustained by proof of the sale and delivery of the goods, although a note may have been given therefor: 17 Serg. & Low. 152. If however a note has been given, in such case the production of the note is generally required, for the security of the defendant, and not from any rule of evidence which would prevent the introduction of evidence of indebtedness, without the production of the note. It was clearly competent, we think, for the plaintiff to produce other and further evidence of indebtedness, without producing the notes taken for the goods.

If it were important for the defendant to show, that the credit given on the notes had not expired, the burden of such proof was upon him. He should have given notice to have them produced, and if not produced, proved their contents. There is no evidence in this bill of exceptions to show the notes were on time, and the law certainly makes no such inference. We therefore think the court erred in the opinion by them expressed in the first bill of exceptions.

The evidence in the second bill of exceptions was offered to account for the non-production of the note; the court rejected the evidence. If the plaintiff, as we have seen, was not bound to produce the note, he was certainly under no obligation to account for its non-production, and the testimony offered with such view, and such view only, was useless, unnecessary, and inadmissible. We concur with the court in the opinion by them expressed in the second bill of exceptions.

Judgment reversed and *procedendo* awarded.

DEBT HOW FAR EXTINGUISHED BY GIVING NOTE: See note to *Goodnow v. Howe*, ante, 46.

NOTE MUST BE PRODUCED AT TRIAL IN SUIT ON ORIGINAL CONTRACT, or its absence must be accounted for: *Holmes v. De Camp*, 3 Am. Dec. 293. The principal case is cited in support of this point in *Meyers v. Smith*, 27 Md. 50; and *Hooper v. Strasburger*, 37 Id. 403.

ANDERSON v. CRITCHER.

[11 GILL & JOHNSON, 450.]

AGREEMENT FOR LEASE NOT ACKNOWLEDGED AND RECORDED agreeably to the registration laws of the state passes no title whatever in the demised premises to the lessee.

COVENANT TO PAY RENT IS INOPERATIVE AND VOID in such an instrument, and no action can be maintained thereon.

REMEDY OF OWNER WHERE LESSEE OCCUPIES UNDER VOID AGREEMENT is by an action of trespass *q. c. f.* if the occupation is without his consent, or by an action for use and occupation or assumpsit if the lessee occupies with his consent.

WHERE AGREEMENT DECLARED ON IS NOT AGREEMENT GIVEN ON OYER according to its true intent or meaning, a demurrer to the declaration should be sustained.

APPEAL from Harford county court. Critcher brought an action of covenant against Anderson. There were three counts in the declaration; the decision was for the defendant on the first two counts and for the plaintiff on the third. The decision on the first two counts was not appealed from. Anderson appealed from the decision on the third count. This count alleged that Critcher leased certain premises to the defendant "from the twenty-fifth of March in the year 1834, until the tenth of May in the year last mentioned, and so from year to year, for so long a time as they the said plaintiff and defendant should please." The declaration also alleged a covenant of the lessee to pay rent, on which this action was brought, the defendant being in default. The oyer of the agreement as far as is material is as follows: "Mem. of agreement entered into this twenty-fourth day of April, 1833, between John Critcher, etc., of the one part, and Donahoo and Anderson, etc., of the other part—witnesseth, the said John Critcher binds himself, his heirs, etc., to give said Donahoo and Anderson a lease for ten years" of the premises in question. Then followed, among other covenants, the covenant to pay rent. The instrument was signed by all the parties, and witnessed but not acknowledged and recorded. The defendants demurred to the declaration on several grounds. 1. Because the lease professed to pass an interest in lands for more than seven years and had not been acknowledged and recorded as the law required, and was therefore void. 2. Because the lease set out in the declaration was variant from that shown to the court, in this: First, that the declaration alleged lease to be with defendant, whereas the instrument produced was a lease to defendant jointly with Donahoo. Second, that the

declaration set out a lease from year to year, whereas the indenture shown the court was a lease for ten years. Third, that the lease declared on was from the twenty-fifth of March, 1834, to the tenth of May in the same year, and so from year to year, whereas from the oyer of the memorandum it appeared the lease was to commence on April 24, 1833. Fourth, that the lease declared on began on the twenty-fourth of March, 1834, whereas the lease shown had no certain time of commencement. Each of these variances constituted a separate ground of demurrer. The court rendered judgment for plaintiff.

Scott, for the appellant.

Bradford, contra.

By Court, DORSEY, J. The declaration in the case before us contains three counts, to all of which the defendant demurred. To the first two counts the court ruled good the demurrer; and from such their decision no appeal has been prosecuted. The demurrer to the third count was overruled, and from the judgment of the county court overruling that demurrer, the present appeal has been prayed. We deem it unnecessary from the view we have taken of this case to determine, whether the agreement entered into by the parties be a lease or a mere agreement for a lease, nor do we consider it necessary to decide on the sufficiency of many of the grounds of demurrer which have been discussed before us. There is nothing in the agreement from which it can be, with any degree of certainty, ascertained, whether the demised premises be in the state of Maryland, or where they are located. The appellants insist that they lie in Maryland, and that the instrument of writing on which the present action of covenant is founded, is for the term of ten years, determinable, however, within the term, at the will of the appellant, upon his giving notice to the appellee, on or before the month of June, otherwise the term will continue for another year. With this construction of the agreement we concur, and if it be conceded that the demised premises lie in Maryland, we think the court erred in overruling the demurrer. Because the agreement not being acknowledged and recorded agreeably to the registration laws of the state, it passed at law no title whatever in the demised premises to the appellant, and consequently the covenant for the payment of rent which is dependent on the appellant's title, or interest in the demised premises created by the agreement, is wholly inoperative and void; and no such action of covenant can be maintained thereon, whether regarded

as a lease or a covenant for a lease. If the appellant has under color of this agreement, occupied the property intended to be demised, the appellee's remedy for the rent is not in covenant; but if the occupation be without his assent, it is trespass *quare clausum fregit*; if with consent, an action for use and occupation, or on assumpsit upon an agreement from year to year of similar import with that ineffectually executed, and which the law implies as existing between the parties.

Should the demised premises not lie in Maryland, we think the demurrer ought to have been sustained; because the agreement declared on in the third count is not the agreement given on oyer, either according to its tenor, or true intent and meaning, as we interpret it.

The judgment of the county court is reversed, and *procedendo* awarded.

Judgment reversed and *procedendo* awarded.

PRINCIPAL CASE HAS BEEN CITED TO THE FOLLOWING POINTS: In *Polt v. Reynolds*, 31 Md. 112, to the effect that no interest in land for a term exceeding seven years can be created by acts *in pais*; and *Kinsey v. Minnick*, 43 Id. 121, in support of the position that lessees holding under an invalid lease are liable for rent on an implied verbal agreement. The principal case was approved in *Lawson v. Snyder*, 1 Id. 77; and in *Howard v. Carpenter*, 11 Id. 276, the language of the court regarding the validity of the lease and the plaintiff's remedy for rent is quoted with approval.

NEWCOMER AND STONEBRAKER v. KLINE.

[11 GILL AND JOHNSON, 457.]

WHERE WORD "DOLLARS" WAS OMITTED FROM BILL SINGLE, by mistake, so that a party was deprived of the specific security intended to be given thereby, he will be granted relief in equity.

PAROL EVIDENCE NOT ADMISSIBLE TO EXPLAIN PATENT AMBIGUITY.

PARTY ENTITLED TO RELIEF IN EQUITY THOUGH REMEDY AT LAW EXISTS, where on-account of a mistake in drawing up the instrument intended to secure the remedy, it is not as full, adequate, and complete as the one contemplated by the parties.

IN JOINT AND SEVERAL BOND, ALL OBLIGORS ARE PRINCIPAL DEBTORS, as between the obligors and obligees, though as between each other they may have the rights and remedies resulting from the relation of principal and surety.

APPEAL from the equity side of Washington county court. One Newcomer requested a loan of money from the complainant, which complainant agreed to furnish if Newcomer would give security. Thereupon Newcomer and Stonebraker, his

security, executed to complainant their joint and several bill single. Complainant then advanced the money. The instrument was properly signed and sealed, but by mistake the word "dollars" was omitted. The defendant, on an application, refused to pay said bill. The bill prayed for relief against this mistake, its correction, and that defendants be compelled to pay the sum loaned. The defendants demurred to the bill on the ground that the complainant had a complete remedy in a court of common law. The court overruled the demurrer and ordered the defendants to pay into court the amount of the bill with interest and costs.

Palmer, for the appellants.

Price, contra.

By Court, STEPHEN, J. We think that the decree of the court below in this case was correct, and ought to be affirmed. The complainant had not full and adequate remedy at law, and was therefore entitled to the relief which he solicited at the hands of a court of equity. The instrument executed by the principal and his surety, was intended to be a joint and several single bill, for the payment of money lent. By mistake and accident, as charged in the bill, to which there was a demurrer, the word "dollars" was omitted by mistake, in consequence of which the plaintiff was deprived of the specific security which was intended to be given, and was unable to support his action upon the single bill, in a court of law, as a specialty. The principle being well settled that the consideration of a single bill can not be inquired into, or a failure of it averred or proved in an action upon it at law: 9 Gill & J. 342.¹ It is therefore inconsistent with the legal attributes of such an instrument, or its character of conclusiveness, as a specialty, that it should rest partly in writing, and partly in parol. Where the ambiguity is not latent, and raised by extrinsic evidence, but patent, or apparent on the face of the instrument, parol evidence is not admissible to explain such ambiguity; as where a blank is left for the devisee's name in a will, parol evidence can not be admitted to show whose name was intended to be inserted: Roscoe on Ev. 12.

According to contract, the plaintiff was entitled to a security of higher dignity than a mere parol promise. He was entitled to a sealed instrument, the consideration of which could not be inquired into, and although he might have a remedy for his money in a court of law, in a different form of action, it might

1. *Key v. Knott.*

not be so full, adequate, and complete, as the one contemplated by the parties: 7 Conn. 549.¹ In that case a bond was intended to be executed, but the seal was omitted by accident; relief was granted in equity, although it was contended that the party had his remedy at law. The judge in delivering his opinion observing, that the plaintiffs were entitled to a bond, the consideration of which could not be inquired into at law. The remedy might not be adequate.

No doubt can be entertained as to the jurisdiction of a court of equity to correct the mistake in this case, and that such relief will be granted even in the case of a surety. See 1 Johns. Ch. 609.² The surety in this case is equally bound with the principal for the payment of the money; in a joint and several bond, and as between the obligors and obligees, all the obligors are principal debtors, though as between each other they may have the rights and remedies resulting from the relation of principal and surety: 6 Id. 309.³ In the same book, 307, Chancellor Kent says: A party who joins in a bond as surety, is as much bound in law and equity as the principal. Such contracts are of every day's occurrence in the business of life, and recognized as valid in every system of jurisprudence; and it would be most extraordinary and a very great blemish in the administration of justice, if the protection of a court of equity was altogether denied to a creditor requiring equitable assistance against a surety. The surety is, in the contemplation of a court of equity, as much bound as the principal, by the terms of his contract. So in page 306, the chancellor says of the surety, by joining in the bond he becomes a principal debtor to the obligee, and the debt is presumed to have been created upon the credit given to the surety, as well as to the principal debtor. Upon the whole, we think the decree of the court below is correct and ought to be affirmed.

Decree affirmed.

MISTAKE IN DRAWING INSTRUMENT IS GROUND FOR EQUITABLE RELIEF: *Chamberlain v. Thompson*, 26 Am. Dec. 390, and note; *King v. Vaughan*, 28 Id. 104; *Moore v. Vick*, 32 Id. 301; *Clark v. Munyan*, 33 Id. 752; *Beardsley v. Knight*, Id. 193; *Avery v. Lewis*, Id. 203; *Mulford v. Shepard*, Id. 432; *Pillsbury v. Dugan*, 34 Id. 427; also see *Norton v. Marden*, 32 Id. 132; and *Champlin v. Laytin*, 31 Id. 382. The principal case was approved in *Cris v. Withers*, 26 Md. 569.

REMEDY AT LAW, EFFECT OF ON RIGHT TO EQUITABLE RELIEF: See *Willet v. Overton*, 1 Am. Dec. 72; *Long v. Merrill*, 7 Id. 700; *Middletown Bank v. Russ*, 8 Id. 164; *Armsworthy v. Cheshire*, 24 Id. 273; *Bank of Utica v. Utica*, 27 Id. 72; *New London Bank v. Lee*, Id. 713.

1. *Montville v. Haughton*.

2. *Wiser v. Blackly*.

3. *Berg v. Radcliff*.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN AMBIGUITIES: See *Storer v. Freeman*, 4 Id. 155; *Doolittle v. Blakesley*, Id. 218; *Cock v. Taylor*, 5 Id. 650; *Brown v. Bebee*, 6 Id. 728; *Mann v. Mann*, 7 Id. 416; *Goddard v. Bulow*, 9 Id. 663; *Claremont v. Carlton*, Id. 88; *Hall v. Benner*, 21 Id. 394; *Shearman v. Angel*, 23 Id. 166; *Johns v. Church*, Id. 651; *Scanlan v. Wright*, 25 Id. 344; *Moliere v. Pa. F. Ins. Co.*, 28 Id. 675.

DORSEY v. SHEPPARD.

[12 GILL AND JOHNSON, 192.]

IT IS NECESSARY TO VALIDITY OF NUNCUPATIVE WILL that the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, appear by the clearest and most indisputable testimony.

NUNCUPATIVE WILL MADE BY INTERROGATORIES REQUIRES STRICTER PROOF of spontaneity and volition than would be required in an ordinary case. PROBATE OF NUNCUPATIVE WILL MADE BY INTERROGATORIES WILL BE REFUSED where facts leave doubt as to the mental capacity of the testator, and there is not sufficient proof of spontaneity and of the *animus testandi*.

APPEAL from the orphans' court of Calvert county. The appellants offered for probate the following paper, purporting to be the nuncupative will of H. Coberth: "We, the undersigned, certify that Mr. Hezekiah Coberth, on the morning of the twenty-eighth of October, 1841, said in our presence that he wished Doctor George W. Dorsey to act as trustee for his son, to be his administrator, and, to use his own words, he wished him to be his general agent; he moreover said he intended it to be his last will." Then followed the names of four subscribing witnesses. The appellees objected to the probate of the paper on several grounds, the principal one being that it was procured at the instance, and by the solicitations, importunities, and request of persons present at the time, the testator being too weak to resist. The depositions of the subscribing witnesses were substantially as follows: That on the morning of the deceased's death they were all in the room with the deceased. That Doctor Sedgwick (one of the witnesses) told Coberth that if he wished to make any arrangement of his affairs, then was the time to do it, as he had no time to lose. Coberth replied that he wished to make arrangements, but wanted to rest first; that Doctor Weems (another witness) then said to Coberth that if he wished to make any provision for his little son, that was the time and he could rest afterwards. That deceased then called for Doctor George W. Dorsey, who came to the bedside. That Doctor Sedgwick then asked deceased if he wished Dorsey to be the trustee

of his child; deceased answered yes; then Sedgwick asked him if he wished Dorsey to be his administrator; to which deceased replied yes, and added, general agent. Doctor Weems then asked deceased if he wished it to be his last will and testament, to which deceased said yes. There was a question as to the testator's sanity, but the evidence on this point sufficiently appears from the opinion. The court refused probate of the instrument, and Dorsey appealed.

Sollers and Pinkney, for the appellant.

Tuck and Alexander, contra.

By Court, DORSEY, J. Nuncupative wills, though tolerated, are by no means favorites of the law. Independent of the statute of frauds altogether, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended. Facilities which absolutely require to be counteracted, by courts insisting on the strictest proof as to the *facta* of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony: See *Lemanna v. Bonsall*,¹ 2 Eng. Eccl. 147; 1 Williams on Ex'rs, 62; and the case of *Priscilla E. Yarnall's will*, 4 Rawle, 62 [26 Am. Dec. 115]. A will made by interrogatories is valid; but undoubtedly, whenever a will is so made, the court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity of volition, than it would be in an ordinary case: *Green v. Skipworth et al.*, 1 Eng. Eccl. 32. According to these sound and well-established principles, let us proceed to the examination of the case before us: first, premising that no bequests having been made by the alleged nuncupative will, it is not subject to the operation of the statute of frauds in relation to such testaments; nor to that of the act of assembly of 1810, c. 34. The only effect of the will, if admitted to probate, and it were competent to effectuate the supposed intent of the testator, would be to secure to the appellant the appointment of executor or administrator of the deceased, and the guardianship of his only child. The latter object, however, could not be accomplished; a written will being made indispensable for such a purpose, by the statute of 12 Car. II., c. 24.

1. *Lemann v. Bonsall*.

To the admission to probate of the will in question, a number of objections were interposed in the orphans' court, most of which we deem it unnecessary to examine. That on which we think the decision of the cause mainly depends, as far as such objections are concerned, is the allegation of the appellees, that the will, attempted to be proved, was not the voluntary act and free will of the deceased, but he was induced to speak of his affairs, as mentioned in said paper, by the suggestion of others, only a short time before his death, and when he was not in a mental or physical condition to make a will, or execute a valid deed or contract; and that in the situation in which he was placed, and the circumstances connected with the execution of said paper, he was too weak to transact business, or to resist the suggestions that were made to him, of the necessity of making a will; and said words, attributed to the deceased, were used by him in consequence of the undue influence of said suggestions. To establish the will, the appellant produced four witnesses, being the only persons, except himself, who appear to have been with the deceased at the time it is alleged to have been made. Two of those were the attending physicians; one a person sent for by the appellant, and the fourth an accidental visitor.

The orphans' court proceeded to take their testimony; and as respects the sanity of the decedent, what have they testified? The first witness, Dr. Sedwick, after detailing what he alleged as having occurred on the morning of the making of Coberth's testament, and of his death, proceeds thus: "This deponent further says, that the reason why he mentioned this subject to Hezekiah Coberth was, his having heard him, during his illness, express a wish to make some arrangement respecting his affairs; that they were not at that time, as he wished; and that he wished that they, Dr. L. L. Weems and himself, should do something for him, as he wished to recover and recruit to make some arrangements; and that at the time he Hezekiah Coberth made these declarations, he was perfectly sane; and that the aforementioned words, purporting to be his last will, were spoken by Mr. Hezekiah Coberth in the presence of him the deponent, Dr. L. L. Weems, James M. Sollers, and James Williams; and that they were spoken in his last illness, and in his own house and place of residence; and that he this deponent was called to Mr. Hezekiah Coberth, on Saturday previous to his death; and that the words expressive of a disposition to make some arrange-

ment, were spoken a part on Monday, and a part on Tuesday or Wednesday." The deceased died on Thursday morning, as proved by Dr. Sedwick. He gives no testimony as to the sanity of the mind of the decedent, at the time of the nuncupation in question, but confines his evidence on this subject, to its state some one, two, or three days before. Dr. Weems states that "on Thursday morning he found him (Coberth) in a dying condition, but perfectly rational." James M. Sollers says, "he believes that Mr. Hezekiah Coberth was rational" at the time of the alleged nuncupation. But what degree of rationality was meant by the witness? Whether a mere exemption from delirium, or such a degree of intellect as would enable its possessor to make a valid deed or contract, or a reasonable or sensible disposition of his property, does not appear. James Williams, the remaining witness, gives no testimony as to the sanity of the deceased. When then we advert to the fact, that the want of mental capacity in the deceased, was a ground of objection to the probate; that, independently of such objection, it was the duty of the appellant to prove such capacity by the clearest and most indisputable testimony; that of the four witnesses to the will, but two of them testify as to such capacity; that he who does so most strongly, says, that when he visited Coberth, on the morning of the alleged nuncupation (which was the morning of his death), he found him in a dying condition; that all the facts given in evidence by the witnesses as to the conduct of the deceased, and those around him, during the time of the alleged nuncupation, leave upon the mind doubts as to the mental capacity of the testator. We think the orphans' court were right, upon that ground, in refusing to admit to probate the proffered nuncupative will. We think, too, looking to all the proof in the cause, and the manner in which, by interrogatories, the alleged nuncupation was drawn from the decedent, that there was not such proof of spontaneity, and of the *animus testandi*, as is indispensable to the validity of such a will. The only reported case, which we have met with of a will made by interrogatories to the testator, is that of *Green v. Skipworth et al.*, 1 Eng. Eccl. 32: at which it is only necessary to glance for a moment, to see that its admission to probate stands upon grounds infinitely stronger than could be urged in favor of that now under consideration. To grant probate to the will now before us, would, in our opinion, establish a precedent fraught with the most dangerous tendency.

The decree of the orphans' court is affirmed, with costs.

NUNCUPATIVE WILLS, HOW FAR VALID: See note to *Sykes v. Sykes*, 20 Am. Dec. 40, and note 44, where this subject is discussed; also *Winn v. Bob*, 23 Id. 258; *Yarnall's Will*, 26 Id. 115; *McCune v. House*, 31 Id. 438. The principal case is cited with approval in *Hammett v. Shanks*, 41 Md. 219.

STATE v. PRICE.

[12 GILL AND JOHNSON, 260.]

RULE THAT INDIOTMENT MUST NEGATIVE EXCEPTIONS IN STATUTE does not apply to a case where the charge preferred *ex natura rei* conclusively imports a negative of the exceptions.

COURT JUDICIALLY KNOWS WHAT A BILLIARD TABLE IS, and that it is not a table at which faro is usually played.

BILLIARD TABLE USED FOR PLAYING GAME OF FARO ceases to be a billiard table in the eyes of the law, and does not fall within the exception of a statute prohibiting the keeping of any gaming table except billiard tables.

INDICTMENT charging that appellee "unlawfully did keep a certain gaming table called a faro table, at which said gaming table, unlawfully kept as aforesaid, the game of faro was then and there unlawfully played for money, against the act of assembly in such cases made," etc. The indictment was found under the act of 1826, c. 88, which enacted that "every person who shall be duly convicted of keeping any E. O. table, or any other kind of gaming table (billiard tables excepted), at which the game of faro, equality, or any other game of chance shall be played for money, shall for the first offense forfeit and pay," etc. The defendant demurred to the indictment on the ground of its insufficiency. The demurrer was sustained, and the state appealed.

Boyle, for the state.

Handy, Pitts, and Richardson, contra.

By Court, DORSEY, J. The correctness of the judgment of the county court, it is asserted by the appellee, is fully established by the general principle, as stated in Archb. Cr. Pl. 21, and other elementary writers upon the subject, "that if there be any exception contained in the same clause of the act, which creates the offense, the indictment must show, negatively, that the defendant or subject of the indictment does not come within the exception." If the meaning of this rule be, as is contended, that the indictment must contain an express negation of the exception, it is not warranted by a fair construction of the opinions of the court, in the cases referred to, as its basis. In

announcing such a principle, the court must be understood as asserting it in reference to the cases then before it, and those of a similar character. In all of which it will be found that, but for such negation, the guilt of the accused would not conclusively appear. Under the exception he might be innocent, although every allegation against him be fully proved. The rule, in such cases, and in such only has it ever been declared from the bench in any reported case that we can find, is undeniably true. But to apply it to a case like the present, where the charge preferred, *ex natura rei*, as conclusively imports a negative of the exception, as if such negative had been in express terms, would violate the soundest principles of construction; and give to the rule an universality of operation which its terms do not import, and was never contemplated in the decisions or commentaries to which it owes its birth. The true rule upon the subject is thus given by Lord Mansfield, in *Rex v. Jarvis*, Hil. Term, 30 Geo. II., reported in note K, in *King v. Stone*, 1 East, 644, "where exceptions are in the enacting part of a law, it must appear in the charge, that the defendant does not fall within any of them." And in *Spiers v. Parker*, 1 T. R. 141, "the plaintiff must aver a case, which brings the defendant within the act." To sustain the doctrine contended for by the appellant—if a statute were passed, making "the malicious killing of cattle, except horses," a felony: and an indictment charged the malicious killing of a cow, it would be defective, unless it negatived the exception, by stating that the cow was not a horse. An allegation so useless, not to say absurd, can not be required by any technicality, either in civil or criminal pleading.

But it is urged by the counsel of the appellee, that the court can not judicially know what a billiard table is, or that it is not the table at which the game of faro is usually played. To such a proposition we can not yield our assent. We know of no recognized presumption, either of law or fact, that imputes to the court an ignorance of a matter, like the present, of such notoriety as to be within the knowledge of the community at large. And we feel perfectly warranted in assuming to ourselves such a knowledge upon the subject, as enables us to declare that, in excepting billiard tables, the legislature did not design to authorize their being kept for the playing thereon of the game of faro for money (the authority so to use them being a corollary of the doctrine contended for by the appellee); but that the moment they are so appropriated, they, *ipso facto*, *pro*

hac vice, lose the immunities conferred on them by the exception; and cease to be billiard tables in the eye of the law. When, therefore, the charge in the indictment demonstrates that the gaming table complained of could not be a billiard table, was it not superfluous to have added an allegation to that effect?

The objection taken to the indictment, that it does not describe the offense with sufficient certainty and conformity to the language used in the act of assembly, can not be sustained. The offense is charged in the very words of the act of assembly, by which it is created, with the additional words, "called a faro table," which detract nothing from the sufficiency of the description of the offense, otherwise set forth in the indictment. The prohibition in the act of assembly, is the keeping of a gaming table, at which the game of faro, equality, or any other game of chance shall be played for money. The charge in the indictment is, that the accused "unlawfully did keep a certain gaming table, called a faro table, at which said gaming table, unlawfully as aforesaid, the game of faro was then and there unlawfully played for money." The only difference between the language of the act and that of the indictment is, that in the latter it is alleged that the gaming table was called a faro table. Such an allegation in no wise impairs the indictment, which is perfect without it; and even if it be not wholly rejected as surplusage, its only possible effect would be to impose upon the prosecution the necessity of proving, at the trial, that the gaming table complained of was called a faro table. Totally unlike the present is the case of *Rex v. Craven*, 1 Russ. & Ry. 14, relied on in support of this objection. There the felony, created by the statute, was the stealing of a bank note, or promissory note, for the payment of money. The charge in the indictment was, the stealing of "a certain note commonly called a bank note." And the court say, "that in the first special description of the property stolen, it being stated only to be a note, was not sufficient; the words of the act being bank note or promissory note for the payment of money. And that the addition 'commonly called a bank note,' 'did not aid such original wrong description.'" In the case at bar, there was no original wrong description which required aid from the words that were added. On the contrary, the indictment described with technical accuracy, in the very language of the act of assembly, the offense committed, and such description was neither aided nor impaired by the additional words unnecessarily used.

The judgment of the county court is reversed, and the cause remanded thereto.

Judgment reversed and *procedendo* awarded.

INDICTMENT CHARGING STATUTORY OFFENSE, FORM OF: See *Republic v. Newell*, 2 Am. Dec. 381; *Commonwealth v. Searle*, 4 Id. 446; *Hess v. State*, 22 Id. 767; *People v. Enoch*, 27 Id. 197; *State v. Buckman*, 29 Id. 646; *Chapman v. Commonwealth*, 34 Id. 565; *Sherban v. Commonwealth*, Id. 460.

JUDICIAL NOTICE OF COURTS, WHAT FALLS WITHIN: See note to *State v. Twitty*, 11 Am. Dec. 779; *Mason v. Wash*, 12 Id. 138; *Bryan v. Beckley*, Id. 276; *Holley v. Holley*, Id. 342; *Boggs v. Reed*, Id. 482; *McFee v. S. O. Ins. Co.*, 13 Id. 757; *Floyd v. Johnson*, Id. 255; *Slaughter v. Barnes*, Id. 190; *Scott v. Coleman*, 15 Id. 71; *People v. Herkimer*, Id. 379; *Ocean Ins. Co. v. Francis*, 19 Id. 549; *Vanada v. Hopkins*, 19 Id. 92; *Arayo v. Currell*, 20 Id. 286; *Mayor of New Orleans v. Ripley*, 25 Id. 175; *Holmes v. Broughton*, Id. 536; *Stiles v. Stewart*, 27 Id. 142; *Owen v. Boyle*, 32 Id. 143; *Com. B'k of N. O. v. Newport Mfg. Co.*, 35 Id. 171.

GAMING, WHAT CONSTITUTES: See note to *State v. Smith*, 33 Id. 132, and note, where this subject is discussed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

JOHNSON v. JORDAN.

[2 METCALF, 234.]

ONE CAN NOT ENTER ON LAND OF ANOTHER TO REPAIR A DRAIN running from the former's house through the latter's lot, where the drain was made by the former owner, who conveyed both lots by different deeds executed simultaneously, without mentioning right of drainage through the lot, and where another drain from said house may, with a reasonable outlay, be constructed without passing through said lot.

RIGHT TO RUN DRAIN THROUGH ANOTHER'S LAND can be created by actual use, only where such use has been adverse, peaceable, uninterrupted, and continued for a period of twenty years.

TRESPASS for breaking and entering the plaintiff's close. The judge charged the jury that if they found that, with reasonable labor and expense, a drain could be conveniently made, without going through the plaintiff's land, they should return a verdict for the plaintiff. There was a verdict for the plaintiff, upon which judgment was to be entered if the instruction was correct. The other facts appear from the opinion.

B. R. Curtis, for the defendant.

Blair and E. D. Sohier, for the plaintiff.

SHAW, C. J. In an action of trespass *quare clausum fregit*, the defendant justifies under a claim of right to enter, and open and cleanse a drain, running from his own house into and through the defendant's premises, to a sewer in Ridgway's lane. If he has such a right, it is a good justification; it being admitted that he entered for that purpose, and did no damage

beyond what was necessary to accomplish it. But the plaintiff contends that the defendant had no right to continue the drain through his premises; and this is the question for the consideration of the court.

It is very clear that whilst both estates were held by the same owner, he had a right to carry his drain as he pleased, through any part of his own grounds; and so long as both tenements were owned and occupied by the same person, no easement was created, or began to be created, in favor of one, and operating as a service or burden upon the other. So long, therefore, as such unity of title and of possession subsists, no right of easement is annexed to one tenement, or charged on another; and it is quite immaterial how long the drain has subsisted during such ownership. If such an owner will convey one of the tenements and retain the other, he may grant the right of drain, or not, to pass with the estate conveyed, or may reserve such a right over the estate conveyed, for the benefit of the one retained, as he pleases. It is matter of contract, and must depend entirely upon the construction of the conveyance. Supposing this to be clear, the question recurs, what construction will the law put upon a conveyance, where the intention of the parties in this respect is not expressed in terms.

In the first place, it is proper to distinguish an artificial gutter of this description, made for the purpose of draining, from a natural watercourse, the rights of parties to which depend upon a different principle. Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land, on the same watercourse, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse can not destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it.

This case is also to be entirely distinguished from one wherein the declivity of the land and the relative position of the tenements are such, that a drain can not be formed for the benefit of one, without passing through the other. Such a case might stand upon a different ground. But in the present case, it was found by the jury, that a drain could be conveniently made,

with reasonable labor and expense, from the defendant's house, without going through the plaintiff's land.

There are some general and well-settled rules of construction of conveyances, which tend in some degree to settle the question. The language of the deed is the language of the grantor; he selects the terms, and it being supposed that he will insert all that has been agreed upon beneficial to himself, and will be less careful to state fully all which is beneficial to the grantee, the language is to be construed most strongly against the grantor.

Another well-settled rule of construction is, that a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey. When therefore a party has erected a mill on his own land, and cut an artificial canal for a raceway through his own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor's land shall pass as a privilege annexed *de facto* to the mill, and necessary to its beneficial use: *New Ipswich Factory v. Batchelder*, 8 N. H. 190 [14 Am. Dec. 346].

Under these rules it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee: Whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be, if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance: *Leonard v. White*, 7 Mass. 8 [5 Am. Dec. 19]; *Grant v. Chase*, 17 Id. 443 [9 Am. Dec. 161].

But neither of these rules will apply to the present case, because it appears by the deeds themselves, as well as by the other evidence in the case, that the two conveyances from the owner of the whole, under which the parties claim, were simultaneous. It is therefore much more like a partition between tenants in common, where each party takes his estate with the rights,

privileges, and incidents inherently attached to it, than like the case of grantor and grantee, where the grantor conveys a part of his land, by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage has been granted with the estate conveyed over that retained, or reserved over that conveyed, for the benefit of that retained.

In the present case, the estates were both owned and occupied by Mr. Thacher until the sale made to Mr. Thorndike and Mr. Kendall, under whom the plaintiff and defendant respectively derive title. Both of these deeds bear date the same day. Each refers to the estate described, as this day sold to the other. Both deeds must be taken and construed together. In the deed to Thorndike, an easement for a gutter was created; and in the deed to Kendall, the same is charged as a perpetual servitude, in favor of Thorndike and his heirs. The conveyance to Kendall was made upon an onerous condition never to open windows in any building to be erected on the premises, on the side next to the dwelling-house conveyed to Thorndike; a condition manifestly designed for the benefit of the estate conveyed to the latter; and in the deed to Thorndike, this restriction upon the estate conveyed to Kendall is recited; intended, no doubt, to show that the estate to Thorndike and his assigns was thereby enhanced in value. The well-known maxim of construction, and a very sound one, is, *expressio unius exclusio est alterius*. Here was a division of these two tenements intimately connected with each other, with detailed provisions in respect of the rights which each should have in the other, and the duties to which each should be subject in favor of the other. If it was intended that one should have a perpetual right of drainage through the other, with a right of entry at all times to repair and relay such drain, especially where it is found not to be necessary to the enjoyment of the estate granted, it seems reasonable to suppose that it would have been expressed. As no such right was expressed, we are of opinion that it was not intended to be granted; and as it was not necessary to the enjoyment of the estate, and had not been *de facto* annexed, so as to pass by general words as parcel of the estate, it did not pass to the defendant's grantor by force of the deed. As about ten years only elapsed after these conveyances, and the consequent division of the two tenements between different proprietors, before the grievance complained of, it is very clear that the defendant derived no right to the easement by actual use and en-

joyment. Such a right in the estate of another can be created by actual use, only when such use has been adverse, peaceable, and uninterrupted, and continued for a period of twenty years.

Judgment on the verdict for the plaintiff.

PRESUMPTION OF GRANT OF EASEMENT: See *Sims v. Davis*, 34 Am. Dec. 581; *Worrall v. Rhoads*, 30 Id. 274, note 278, and cases there cited and collected.

THE PRINCIPAL CASE IS CITED in *Collier v. Pierce*, 7 Gray, 20, as an instance in which it was found that the actually existing drain was not necessary for the use of the tenement for which it was claimed; in *Carbrey v. Willis*, 7 Allen, 368, to the point that if a person, who, owning two tenements, has built a house on one, and annexed thereto a drain passing through the other, convey the house with the appurtenances, such drain may be construed to be *de facto* annexed, and pass with it; whereas, if he were to convey the lower tenement, still owning the upper, it might be considered that as the right of drainage was not reserved in terms when it naturally would be if so intended, it could not be claimed by the grantor; in *Randall v. McLaughlin*, 10 Id. 368, to the point that there is not an easement by necessity where an equally beneficial drain could be built on the plaintiff's own land, with reasonable labor and expense; in *Philbrick v. Ewing*, 97 Mass. 135, to the point that the grant of a principal thing carries all things necessary to the use and enjoyment of the thing granted, that the grantor had power to convey; in *Hapgood v. Brown*, 102 Id. 454, that doubtful terms in a deed are to be construed most strongly in favor of the grantee; in *Randall v. Sanderson*, 111 Id. 120, that no easement of light and air exists in a case where windows, though convenient, are not necessary to the enjoyment of the estate granted.

BRIGGS v. PARKMAN.

[2 METCALF, 258.]

RETENTION, BY VENDOR, OF POSSESSION OF GOODS, AFTER SALE, is only presumptive evidence of fraud, which may be repelled by other testimony.

MORTGAGE OF TRADER'S STOCK OF GOODS IS NOT FRAUDULENT PER SE, although it provides that the mortgagor may retain possession, and make sales in the usual course of business, applying the proceeds thereof to his own use, where he, at the same time, promises, if he should make large sales, to replace the goods so sold, and where the property mortgaged is more than sufficient to pay the debt. The presumption of fraud arising from such a transaction may be repelled by satisfactory evidence.

PROPERTY OF DEBTOR WHICH VESTS IN HIS ASSIGNEE UNDER STAT. 1838, c. 163, is that only which he had at the time of the first publication of the notice of issuing the warrant to the messenger. And therefore, where a mortgage was made by the debtor, which was recorded before that time, but after the assignment was made, it will be good as against the other creditors, and the mortgagee will hold the property mortgaged, as against the assignee.

APPEAL from a decree of a master in chancery. A verdict was

taken for the appellee, and the questions of law reserved. The other facts sufficiently appear from the opinion.

Bartlett, for the appellant.

E. Blake, for the appellee.

WILDE, J. This is a case of appeal from an order or decree of a master in chancery, made in pursuance of the third section of Stat. 1838, c. 168, entitled "an act for the relief of insolvent debtors, and for the more equal distribution of their effects." The general question to be decided is, whether the mortgage deed to the appellee from the insolvent debtor, made before his application to the master in chancery to be allowed to take the benefit of said act, is a valid deed in law, or whether the title to the goods mortgaged passed by the assignment of the debtor's property to the appellant, the assignee, notwithstanding the mortgage.

At the trial of the cause in this court, it appeared that it was agreed between the parties to the mortgage, that Loring, the said debtor, should mortgage to the appellee the principal part of his stock in trade, and that the mortgagor should continue in possession of the goods mortgaged, and make sales of the said property in the ordinary course of business, and apply the proceeds to his own use: he at the same time representing, that he should not at that season make any large sales, and if he should, that he would add to the amount of the mortgagee's security by other property.

The counsel for the assignee maintains, that this agreement vitiated the mortgage, and rendered it void as to the creditors of Loring; that such an agreement is fraudulent in law, or is conclusive evidence of fraud, not open to explanation, however fair and honest the intention of the parties may have been. In regard to the objection in relation to that part of the agreement respecting the mortgagor's continuing in possession of the mortgaged property, the law, as it is considered in this commonwealth, has long been well established, and it is no longer open to discussion. It has always been held by this court, that where a vendor continues in possession of the goods sold, after the sale, with the consent of the vendor, such a possession is only a badge or presumptive evidence of fraud, which it is proper to submit to a jury, and which may be explained, and the inference of fraud repelled by other evidence. On this question there have been many conflicting decisions in other courts; but the question is now settled in the state of New York, in con-

formity with the doctrine as held in this commonwealth; and such appears to be the doctrine as now held in England: [15 Am. Dec. 259]; *Bissell v. Hopkins*, 3 Cow. 166; *Seward v. Jackson*, 8 Id. 406; *Kidd v. Rawlinson*, 2 Bos. & Pul. 59; *Martindale v. Booth*, 3 Barn. & Adol. 498; *Hinde v. Longworth*, 11 Wheat. 199; *Arundell v. Phipps*, 10 Ves. 145; *Latimer v. Batson*, 4 Barn. & Cress. 652.

In the case of *Bissell v. Hopkins*, it was settled, after an examination of the principal authorities, that the possession of goods continuing in the vendor after the sale was only presumptive evidence of fraud, which might be explained by other evidence. And we do not understand the counsel for the assignee to deny the doctrine thus established; but he relies on the other part of the agreement, which he insists is not merely a badge of fraud, but that it vitiated the security and rendered it void *per se* as to creditors. But we consider the agreement as to the mortgagor's continuing in possession of the goods mortgaged, after the mortgage, and the permission to sell a part of the property, and to apply the proceeds to the mortgagor's own use, as evidence of the same character, and as tending to raise the same presumption; the one part of the agreement may raise a stronger presumption of fraud than the other, but this is a difference only in the weight of the evidence. Both parts of the agreement tend to prove a fraudulent intent, but both may be explained consistently with honest intentions and fair dealing; and if they may be so explained, and the inference of a fraudulent intent repelled, there seems to be no reason for excluding the explanatory proof. It has been argued, that the necessary consequence of the agreement was to deceive and defraud the creditors of the insolvent debtor; and that a party must always be presumed to have intended that which necessarily must follow from his act. But it was not a necessary consequence of the agreement that creditors would be defrauded; and even if that were the necessary consequence of the agreement, it would not follow that such a presumption might not be rebutted by evidence.

The question to be decided is, whether the mortgage deed was given with the fraudulent intent to cover the property, and thus to delay or defraud creditors; and this question is to be determined by the whole evidence, presumptive and explanatory. In *Cadogan v. Kennett*, Cowp. 432, Lord Mansfield says, that "the statute does not militate against any transaction *bona fide*, and where there is no imagination of fraud. And so is the common

law. The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors."

The next question to be determined is, whether upon the whole evidence it appears, or may be reasonably presumed, that the mortgage in question was made with any fraudulent intent to defeat or delay creditors. This question is submitted to the court by the agreement of the parties.

If the mortgage deed to the appellee had been an absolute sale and conveyance, the agreement that the vendor should be allowed to sell any part of the property, and to appropriate the proceeds to his own use, would be strong presumptive evidence of fraud, and for aught that appears would be conclusive. But as the conveyance was only by way of security, and as the goods, according to the estimated value, were more than sufficient to secure the mortgage debt; and as it was agreed by the mortgagor that he would not make any large sales, or if he did, that he would add to the amount of the mortgagee's security by other property—that he would pay half the note in thirty days, and at the end of thirty days the mortgagee should have a right to examine the amount of sales—we are of opinion, taking into consideration all these circumstances, that there is no reason for the inference of fraud arising from the agreement, but that it is repelled by satisfactory evidence.

The next question raised by the report of the evidence depends on the construction to be given to the first, fifth, and sixth sections of the insolvent law: Stat. 1838, c. 163. The first section provides, that the messenger shall take possession of all the estate, real and personal, of the debtor, excepting such as may be by law exempted from attachment; and this was done on the fifteenth of July, at thirty minutes past one o'clock, and before the mortgage to the appellee was duly recorded. The mortgage had been before recorded in Boston, but was not recorded in Roxbury, where the mortgagor resided, until thirty minutes past three o'clock of the same fifteenth day of July. By the fifth section, it is provided that the judge of probate shall assign and convey to the assignees "all the estate, real and personal, of the debtor, excepting such as may be by law exempted from attachment; which assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken in execution on any judgment against him, at the time of the first publication of the notice of

issuing the warrant" to the messenger. This publication of notice by the messenger was made on the morning of the sixteenth of July, the day after the appellee's mortgage had been duly recorded. By the sixth section, the messenger is required, as soon as may be after his appointment, to demand and receive from the debtor, and from all other persons, all the estate in his or their possession respectively, which by the previous sections is ordered to be assigned.

There appears to be no difficulty in ascertaining the true meaning and construction of these sections, so far as they relate to the question under consideration. There is an apparent discrepancy between the first and the sixth sections, the first requiring the messenger to take all the debtor's property, excepting such as may be by law exempted from attachment, and by the sixth section he is to take all the debtor's property which was liable to be assigned. But this difference in the language of the two sections is not material; it must, we think, have been intended by the sixth section to limit the generality of the provision in the first section, which thus limited corresponds with the provision in the fifth section. But however this may be, the question to be determined depends on the construction of section five, in regard to which there can be no doubt. The language is express, and limits the assignment to the debtor's property at the time of the first publication of the notice of issuing the warrant to the messenger. At that time, the appellee's mortgage had been recorded according to law, and consequently the property in dispute could not vest in the assignee.

It is however denied by the counsel for the assignee, that the mortgage deed has been recorded according to law; because the mortgagee had notice, before he recorded his deed, of the application of the mortgagor to be allowed to take the benefit of the insolvent law, and of the proceedings had thereon, and that the messenger had taken actual possession of the goods mortgaged.

If the mortgage had been made after such notice, there would be great weight in the objection; but the mortgage deed was made before these transactions, was a *bona fide* conveyance, and unquestionably the mortgagee had a right to complete his title. At the time the deed was recorded, the assignee had obtained no title; nor does the title since obtained reach back to the time of the record. So that the case of *Cushing v. Hurd*, 4 Pick. 253 [16 Am. Dec. 335], is in point, and is conclusive. Indeed there does not appear to be either law or equity in favor of the claim of the appellant in behalf of the creditors. The appellee paid

to the debtor over five thousand dollars, which has increased the amount of the debtor's assets, to be distributed among his creditors, and they claim also the mortgaged property, leaving the mortgagee to take his share with the other creditors, although he never trusted to the personal credit of the mortgagor. This we think is not an equitable claim, and to avoid it the mortgagee had a perfect right to record his mortgage. If this mortgage had been given to secure a prior debt, the equity of the case would have been different; and if it had been so made by the debtor in contemplation of his becoming insolvent, and of obtaining a discharge under the provisions of the insolvent law, the mortgage would be void as to creditors, by the tenth section of the act. But by a proviso, this clause is not to apply to any security given for the performance of any contract, where the agreement for such security is part of the original contract, and the security is given at the time of making such contract. This mortgage therefore would have been a valid security, although it had been made by the debtor, in contemplation of insolvency, and of obtaining a discharge from his creditors, unless that intention had been known by the mortgagee. And this provision seems to be founded on equitable principles and sound policy. Without this proviso, no one could rely on his security, however fairly and honestly it had been obtained.

Upon the whole matter, therefore, we are of opinion that the decision of the master was correct, and must be affirmed.

RETENTION OF POSSESSION BY VENDOR, EFFECT OF: See *Richmond v. Orudup*, 33 Am. Dec. 164, note 165, where the cases on the subject are collected.

THE PRINCIPAL CASE IS CITED in *Andrews v. Southwick*, 13 Metc. 536, to the point that the first publication of notice to creditors fixes the time when an attachment is dissolved; in *Jones v. Huggesford*, 3 Id. 518, in *Codman v. Freeman*, 3 Cush. 309, and in *Winsor v. McLellan*, 2 Story, 498, to the point that a power to sell and purchase other property contained in a mortgage does not necessarily render such mortgage void; in *Bingham v. Jordan*, 1 Allen, 374, to the point that if a mortgage is not recorded until after the first publication of notice of issuing a warrant in insolvency, the title of the assignee will prevail; in *Howe v. Bartlett*, 8 Id. 21, to the point that the mortgagee is entitled to the possession of property mortgaged, as against the assignee; and in *Sleeper v. Chapman*, 121 Mass. 409, to the point that a provision in a mortgage that the mortgagor may use and enjoy the property until breach of condition does not justify the charge that the assignee of the mortgage had notice that it was fraudulent; and in *Oriental Bank v. Haskins*, 3 Metc. 338, that retention of possession by vendor after sale is not, in Massachusetts, considered conclusive evidence of fraud.

BROOKS v. WHITE.

[2 METCALF, 283.]

WHERE CREDITOR RECEIVES IN FULL SATISFACTION OF HIS DEBT, the note of a third person, for a sum less than is due to him, it is a good accord and satisfaction to bar a suit for the balance, and so is the receiving of a less sum than is due in satisfaction of the whole, before the debt is due. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A RECEIPT, and to show to what demands it was meant to apply.

ASSUMPT on a promissory note signed by White & Co., and payable to the plaintiffs. Downing and Wright were former partners with White, the three constituting the firm of White & Co. The defense was an accord and satisfaction, and at the trial the defendant introduced the deposition of Downing, in which he deposed that before the note in suit fell due, he agreed with the plaintiffs to indorse to them two notes of third persons which he held, amounting to a less sum than the amount of the note in question, but which the plaintiffs then agreed to accept in full of all claims and demands; that he thereupon indorsed and the plaintiffs accepted the notes. They gave a receipt, but Downing seems to have lost it. The jury found for the defendant, and the plaintiffs moved for a new trial, on the ground of misdirection. The other facts appear from the opinion.

Crowninshield, for the plaintiffs.

B. R. Curtis, for the defendant.

DEWEY, J. The plaintiffs contend that the evidence, offered to sustain the defense of an accord and satisfaction of the note upon which this action is instituted, can not avail the defendant, because by his own showing it was only the payment and acceptance of a less sum than the amount due on the note. The general principle, that the acceptance of a less sum in money than is actually due can not be a satisfaction and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon such condition, seems to be recognized in books of unquestionable authority. The reason of the rule is, as stated by Lord Ellenborough, in *Fitch v. Sutton*, 5 East, 232, that there must be some consideration for the relinquishment of the excess due beyond the sum paid; something to show a possibility of benefit to the party thus relinquishing a legal right; otherwise the agreement is *nudum pactum*. So in *Pinnel's case*, 5 Co. 117, where it was resolved that payment of a less sum, on the day, in satisfaction of the greater, can not be a satisfaction

of the whole, because it appears to the judges that by no possibility a less sum of money can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse or the like, in satisfaction, is good; for it shall be intended that the horse might be more beneficial to the party than the money, or he would not have accepted it in satisfaction.

The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due. Thus, where any other articles than money are received and agreed to be accepted in full satisfaction of a debt, the court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. This distinction was recognized in the resolutions in *Pinnet's case*, already cited. In *Boyd v. Hitchcock*, 20 Johns. 76 [11 Am. Dec. 247], the receiving of a note of hand for a less sum than was due, with the name of another person as promisor or indorser, where the creditor agreed to accept the same as a satisfaction of the whole debt, was held a valid discharge, as an accord and satisfaction. In that case, the court say, "here was a beneficial interest acquired, and a valuable consideration received by the plaintiffs, when they agreed to accept less than their whole demand." The same rule was adopted in *Kellogg v. Richards*, 14 Wend. 116, where it was held that if a creditor, on a compromise with his debtor, accept the note of a third person for a less sum than the debt due to him, in full payment of such debt, the acceptance of such note may be pleaded as an accord and satisfaction in bar of an action to recover the balance due beyond the amount thus received. Nelson, J., says, "it is true there does not seem to be much if any ground of distinction between such a case and one where a less sum of money is paid and agreed to

be accepted in full, which would not be a good plea. But the distinction is as sound as that which exists between the cases of receiving a less sum of money, and an article of property just half the value of the sum due, which would constitute a perfect defense. The rule, that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it on slight distinctions."

But there is another principle, which the facts in the present case authorize us to apply, which is equally fatal to the maintenance of the technical objection relied on by the plaintiffs. The same ancient authority which declares that the payment and acceptance of a less sum, on the day the debt becomes due, in satisfaction of a greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction; for it is said, peradventure parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material: *Pinnel's case*, 5 Co. 117. And the same doctrine is found in Co. Lit. 212 b, where it is said, "if the obligor pay a lesser sum, either before the day, or at another place than is limited by the condition, and the obligee receiveth it, this is a good satisfaction:" Yelv. (Amer. ed.) 11 a, note. The transfer of the notes by Downing was therefore a sufficient consideration for a promise by the plaintiffs to receive them in full discharge of the note; and the only remaining inquiry is, whether in its terms the agreement was broad enough to constitute an accord and satisfaction, and a discharge of all the parties to the note, or whether it was restricted to Downing alone. The receipt given by the plaintiffs has been casually lost; but evidence was offered to the jury tending to show that the receipt given to Downing was in its terms amply sufficient to embrace the note, and without any reservation, on the face of it, or any right to collect any part of it of the other promisors. The court left it to the jury to find whether the receipt was intended as a discharge to Downing only, or to all the promisors; and the plaintiffs now insist that this was erroneous, and that it was not competent for the jury to pass upon the intent of the parties as to the effect of this agreement. As it seems to us, this objection can not avail the plaintiff. It was not submitting to them the construction of a

written instrument. Their first inquiry was, whether the plaintiffs had given a discharge of this demand. If that discharge was in full of all demands, as the evidence offered tended to show, it was competent to inquire what demands were the subject-matter of the adjustment, and were understood by the parties to be embraced in the receipt; whether the individual liabilities of Downing only, or the liabilities of the late firm of White & Co., of which firm Downing was a member.

The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They may always be explained by oral testimony: *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]; *Johnson v. Johnson*, 11 Id. 363; *Harden v. Gordon*, 2 Mason, 541; *Rollins v. Dyer*, 4 Shepley, 475.

Judgment on the verdict.

RECEIVING NOTE OF THIRD PERSON, WHEN PAYMENT: See note to *Hutchins v. Olcutt*, 24 Am. Dec. 640, where the cases in this series on this subject are collected.

PAYMENT OF PART OF DEBT is not a satisfaction of the whole, although it is so received: See *Shaw v. Clark*, 27 Am. Dec. 578, note 579, where other cases in this series are collected.

RECEIPTS MAY BE EXPLAINED OR CONTRADICTED BY PAROL EVIDENCE: See *Bridge v. Gray*, 25 Am. Dec. 358, note 363, where other cases on this subject are collected; *Bard v. Wood*, 3 Metc. 75; *Briggs v. Call*, 5 Id. 506; *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 424, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Harriman v. Harriman*, 12 Gray, 342; *Twitchell v. Shaw*, 10 Cush. 48; *Walan v. Kirby*, 99 Mass. 3, to the point that acceptance of a less sum of money than is due can not be a satisfaction; in *Bowker v. Childs*, 3 Allen, 436, to the point that payment of less than the amount of the debt before the day it becomes due is a good satisfaction in law; in *Perkins v. Lockwood*, 100 Mass. 250, to the point that the giving of a note or collateral promise of another person will support an agreement to accept a less sum than is actually due; and in *Simmons v. Almy*, 103 Id. 35, to the point that the rule that a creditor can not bind himself by agreement to receive less than the whole of his debt in satisfaction thereof, is never enforced where the technical reason on which it is founded does not exist.

PERRY v. HARRINGTON.

[2 METCALF, 368.]

WHERE, IN ASSUMPSIT, ACTS STIPULATED TO BE DONE ARE SEVERAL, though stipulated for by one contract, an action lies for each successive breach.

ACCEPTANCE OF ORDER TO PAY CERTAIN SUM OUT OF FIRST MONEY belonging to the drawer, which the acceptor should receive from a certain fund, binds the latter to pay on reasonable demand, from time to time, as the money is received by him. And judgment against the acceptor for one

breach of his contract, in not paying a part, is not a bar to another action on another breach, in not paying on demand a further sum received by him after the commencement of the first action.

ASSUMPSIT on the following order, which had been accepted by the defendants: "Boston, April 8, 1837. Messrs. Harrington & Co.: Please pay Mrs. C. Perry two hundred dollars out of the first money belonging to me, which you may receive on account of the Eastern Star, and oblige your ob't serv't. D. H. Creeig." The other facts sufficiently appear from the opinion.

Sewall, for the plaintiff.

Harrington, for the defendants.

SHAW, C. J. The only question of importance in the present case is, whether the judgment formerly rendered for the plaintiff, on this same acceptance, is a bar to the present action. It is insisted that the acceptance is one single entire contract; and if it is so, it is clear that one judgment upon it is a bar to any other action.

Formerly it was held, that there could be but one action on one contract; and where the contract was to pay by installments, and an action was brought for breach of the contract, by the failure of payment of one installment, it was a question whether the whole amount, including installments not yet due, should be given in damages, or whether the plaintiff, if he thought fit to sue before all the installments were due, must lose the amount of those not due. One or the other result seemed to be the necessary legal consequence of regarding the contract as single and entire.

But it has long been held, that in assumpsit, if the acts stipulated to be done, though all stipulated by one contract, are several, an action will lie for each successive breach. This doctrine was considered and illustrated in a recent case; and it is therefore not necessary to recapitulate the positions taken and the authorities cited: *Badger v. Titcomb*, 15 Pick. 409 [26 Am. Dec. 611].

The question is, whether, by a fair construction, the acceptance in the present case is an undertaking to perform one duty at one time, and then to terminate; or whether it is a stipulation to do more than one. It is an acceptance and undertaking to pay the plaintiff two hundred dollars out of the first money belonging to the drawer, which the acceptor should receive on account of the Eastern Star, a newspaper establishment, transferred by the drawer to the acceptors.

It is obviously a conditional undertaking. Was the whole obligation to be void, if the amount collected should not reach two hundred dollars, and all right to demand anything suspended, until the full sum should be received? We can not consider this the true meaning. It appears to us that the intention was, that the acceptors should pay to the amount of two hundred dollars, if so much should be collected; otherwise, such part of the sum as should be collected. This seems to have been the construction adopted by the acceptors, by their paying a part, and yielding to a judgment for a part. But if payment was not to be suspended until the full two hundred dollars should be collected, and as it might never be collected, then the conclusion of law must be that such part as should be collected should be paid in reasonable time, if requested. No other reasonable construction can be put upon it. It is a general rule, that when a duty is to be done, and no time fixed, it must be done in a reasonable time. Taking this legal conclusion, in connection with the terms of the acceptance, it is an undertaking to pay out of a particular fund, from time to time as received, on reasonable request. The payment, therefore, of part of the amount does not bar the claim for the balance, when collected; and we think the contract, being to pay from time on request, is a contract to be performed at different times, and therefore a judgment for one breach in not paying a part is not a bar to an action on another breach, in not paying on demand the balance admitted to have been collected. The court are therefore of opinion that the plaintiff, on the case stated, is entitled to recover judgment for the balance due on the acceptance.

SEPARATE ACTIONS WHEN MAY BE BROUGHT ON SAME CONTRACT: See *Bendernagle v. Cocks*, 32 Am. Dec. 448, note 454.

ATKINS v. BORDMAN.

[2 METCALF, 457.]

WHERE LANGUAGE OF DEED IS DEFECTIVE OR AMBIGUOUS, it is competent, in order to show what the parties probably meant, to prove the local position, the relative situation of the estate granted and of that reserved, and also the manner in which the grantor himself used it when owner of the whole.

WHERE GRANTOR RESERVES RIGHT OF INGRESS AND EGRESS THROUGH A GATE or passage way about five feet in width, for carrying and recarrying wood or any other thing to and from an adjoining house of the grantor, this amounts to the reservation of the right of a suitable and convenient

passage for the purposes indicated, but does not definitely determine the exact width of the passage way. And if the grantor and those who claim under him have used such passage nearly in conformity with the terms of the reservation, they will be deemed to have held under the reservation, not adversely thereto, and they will be limited by its terms. OWNER OF ESTATE IN FEE IN WHICH ANOTHER HAS AN EASEMENT has still all the beneficial use which he can have consistently with the other's enjoyment of such easement.

WHERE DIMENSIONS OF A WAY RESERVED ARE NOT EXPRESSED, but the object of the reservation is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object.

OWNER OF LAND OVER WHICH HIS GRANTOR RESERVED A PASSAGE WAY may cover in that way by building over it, provided he leave a space high and wide enough, and sufficiently well lighted to answer reasonably well the purpose for which such passage way was reserved.

WHERE GRANTOR IN CONVEYING TENEMENT ADJOINING HIS OWN expressly stipulates that his grantee shall not erect any building nearer to the grantor's than a certain prescribed limit, such stipulation will not prevent the grantee from building a tenement higher than the old one, although by so doing he may lessen the amount of light and air coming to the windows of his grantor.

TRESPASS on the case. The facts sufficiently appear from the opinion.

S. Hubbard and W. Phillips, for the defendants.

Fletcher and Choate, for the plaintiff.

SHAW, C. J. This cause, or rather several causes growing out of the same subject of controversy, have long been before the court; and it is to be regretted that all points of dispute, in regard to the relative rights of the parties, have not yet been adjusted. Several questions have heretofore been decided, and the parties have acquiesced in the decision, and adjusted their buildings in conformity with them: 20 Pick. 291.¹

The main question which now remains for consideration between these parties, is, whether the defendants had a right to erect a building over the passage way which, it is conceded, the plaintiff has a right to have, use, and enjoy, on the southerly side of the defendants' land. It appears that heretofore both of these tenements belonged to one person, and of course neither estate was then subject to any easement for the benefit of the other; because the owner, as the exclusive proprietor, might build upon any part, or use and appropriate any and every part of the estate at his own pleasure, as his own sense of his interest and convenience might dictate. It is obvious, that so long

1. *Atkins v. Bordman*.

as two tenements remain in the estate of the same owner, no right of easement can be created by use, however long continued; because such use can not be adverse. Whenever therefore such proprietor conveys away part of the estate so situated, he may create, annex, and convey with the estate granted, such rights of way over his other estate retained, or other easements therein, as he may think fit; and also he may reserve out of the estate granted, and annex to his own estate retained, such easements as he may deem proper. And the acceptance of the deed by the grantee, whilst it gives him the benefit of the easements granted, subjects the granted estate, both in his own hands, and in those of all others who may come in under him, to the easements reserved. It stands, therefore, upon the ground of convention, between those who have a disposing power.

There are cases, indeed, in which it is held, that long use may be given in evidence to establish the right of the grantee, in such case, to easements in and over the estate of the grantor; but on a very different principle from that on which prescription or presumed grant is founded. The right claimed depends on grant; but the question often arises, from the ambiguity, brevity, or uncertainty of the descriptive words used, what was the extent of such grant; in other words, what was the intention of the parties in making and accepting the grant. In ascertaining this intent, several rules of exposition are adopted, founded upon experience, to enable courts to determine, or to approximate to such meaning and intent. It is a rule, that the language of a conveyance shall be construed most strongly against the grantor; because it is his act, and the language that of his choice or dictation. Again; a grant being made for a valuable consideration, it shall be presumed that the grantor intended to convey, and the grantee expected to receive, the full benefit of it, and therefore that the grantor not only conveyed the thing specifically described, but all other things, so far as it was in his power to pass them, which were necessary to the enjoyment of the thing granted. Thus the grant of a mill actually driven by water, though not described as a water-mill in the deed, carries with it a right to the stream which supplies the mill, although it comes to the mill wholly through other land of the grantor. He can not divert it, and thus derogate from the beneficial effect of his grant. The grant of a messuage or tract of land, with no access to it but over other land of the grantor, is by implication a tacit grant of a convenient right of way to it over such other land. But there is another rule in ascertaining

the meaning of parties where the deed is silent, or the language defective or ambiguous, and one to which we more particularly before alluded; and it is this: that it is competent, in order to show what the parties probably meant, where the language is not fully clear and unambiguous, to prove the local position, the relative situation of the estate granted, that of the estate reserved, and also the manner in which the grantor himself had used it, when owner of the whole. Such evidence of use of particular ways over one estate, in the occupation and enjoyment of the other, may tend to show what was necessary, or useful and convenient in this respect, and so considered by him who had a power to use both as he pleased, and therefore tends to show what, by necessary or reasonable implication, was intended. It is very clear that a grantor, by unequivocal words, may convey one estate by definite description, and create and annex thereto an easement in his own other land. This may also be done by necessary or reasonable implication, if the intent so to do can be inferred. Thus, if one grants an estate, with all the privileges and appurtenances, and there be a right of way over a third person's estate, that right of way passes. Indeed, such right of way passes as incident, though "appurtenances" are not expressed: *Kent v. Waite*, 10 Pick. 138. But if there be no such right of way, which may be legally and technically "appurtenant," but the grantor has commonly used a way thereto over his other land; in order to give effect to the manifest intent, it may be construed to pass a right over such land, not as an appurtenance before existing, but as an easement created by the deed itself, and annexed to the estate granted. So if one grant an estate, with the ways and other easements actually used and enjoyed therewith, evidence *aliunde*, by parol or otherwise, may be given to prove that a particular way was then in use by the grantor; and then it is held to pass as parcel of the estate conveyed: *White v. Crawford*, 10 Mass. 183; *Story v. Odin*, 12 Id. 157 [7 Am. Dec. 46]; *Morris v. Edgington*, 3 Taunt. 24; *United States v. Appleton*, 1 Sumner, 492; *Salisbury v. Andrews*, 19 Pick. 250. This view may perhaps tend to reconcile authorities which may seem conflicting, tending on the one side to show that no length of time, or constancy of use, can create an easement over one estate for the benefit of another, whilst there is unity of title in one owner—and on the other, that long use by the grantor may be evidence of title to the easement in the grantee. The long and constant use of a way over the land of another, without interruption or

objection, is evidence of right, because it is not to be presumed that an owner would permit such use without right. But the long and frequent use of a way over a part of one's own estate, as conducive to the useful and convenient occupation of another part, tends to show that it was necessary or beneficial; and, therefore, if there be no other way, or if there be any words describing or alluding to a way actually used, or when ways "appurtenant" are expressed, and in fact there is no way technically appurtenant, such previous use by the owner may be available to give effect to the presumption that it was intended that such right of way should pass, as parcel of, or incident to, the estate granted.

With this view of the law before us, we are to look at the deed by which the defendants' estate was granted by the plaintiff's predecessor, to ascertain the nature and extent of the plaintiff's easements, for a disturbance of which, this action is brought. It has already been decided that in the present case the actual use and enjoyment, on the part of the plaintiff and his predecessors, over the estate of the defendants and their predecessors, have been so nearly in conformity with the provisions of the deed, that it is to be presumed that the parties intended to claim and hold their rights under it, and, therefore, that the plaintiff's rights depend on the reservations in the deed, and not on prescription. The law will not presume a non-appearing grant, or raise a prescription, where a grant is produced, to which his use, occupation, and enjoyment may be ascribed. The court were of opinion, that the plaintiff's rights depended on the deed from Haugh to Henry Tew, in 1703. In this deed, the grantor having described an existing gate and passage way, of about five feet wide, on the southerly side of the estate granted, leading from the street, now Washington street, into the yard of said messuage, made the following reservation: "Reserving out of this bargain and sale, unto me the said Haugh, my heirs and assigns for ever, free liberty of ingress, egress, and regress through and upon the said gate or passage way, for carrying and recarrying wood, or any other thing through the same, and over the yard or ground of the said messuage hereby granted, into and from the housing and land of me the said Atherton Haugh adjoining, for the use and accommodation thereof, without damnifying or annoying thereby the said Henry Tew, his heirs and assigns." Upon the construction of this clause, the court decided, that a convenient right of passage way was reserved for the benefit of the plaintiff.

iff's estate, but that the width of it was not fixed. And we are still of opinion, that that was the true construction. For, although the gate was described as "about five feet wide," there was no warranty of its width, and no words declaring that he should have the width of the way as it then existed, or any equivalent expression. And the word "about" indicates that it was not intended to be definite. It was therefore the right of a suitable and convenient passage for the purposes indicated: 20 Pick. 295.

On a subsequent trial, the plaintiff claimed a right to the use of the passage way, open to the sky, according to the lines of the south and west walls of the old building on the defendants' lot. As to arching over the passage way, the judge at the trial, instructed the jury that if this did not occasion any inconvenience by darkening it, or otherwise, in respect to the uses for which it was reserved, the plaintiff would not be entitled to any damage on this ground; but on this point they were instructed to assess separate damages. It appears that upon that ground on that trial, the jury assessed damages in the sum of one dollar. On the same ground, the jury on the trial now under review, assessed damages in the sum of three hundred and fifty dollars. It therefore now becomes necessary more carefully to investigate the right thus claimed by the plaintiff, and examine the principle on which it rests; because, if it be true that the plaintiff has the right claimed, to have said passage way open to the sky, the defendants are under a corresponding obligation to take down their building, so far as it is erected over the said passage way.

The owner of an estate in fee, by virtue of his interest and power as proprietor, may make any and all beneficial uses of it at his own pleasure, and he may alter the mode of using it, by erecting or removing buildings over it, or digging into or under it, without restraint. *Cujus est solum, ejus est usque ad cœlum*. If any other person has an easement in it, the owner has still all the beneficial use which he can have consistently with the other's enjoyment of that easement. If the easement is a right of way, this consists in a right to use the surface of the soil, for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use; but the owner of the soil has all the rights and benefits of ownership, consistent with such easement: *Perley v. Chandler*, 6 Mass. 454 [4 Am. Dec. 159]. He is entitled to the herbage growing upon it: *Adams v. Emerson*, 6 Pick. 57. All which the person having the

easement can lawfully claim is the use of the surface, for passing and repassing, with a right to enter upon and prepare it for that use, by leveling, graveling, plowing, or paving, according to the nature of the way granted or reserved; that is, for a foot way, a horse way, or a way for all teams and carriages. When no actually existing way, as bounded and located, is granted or reserved, the right of way in point of width and height, shall be such as is reasonably necessary and convenient for the purposes for which it is granted. If it be a foot way only, it shall be reasonably wide and high for all persons to pass on foot, with such things as are usually carried by foot passengers. If it be a way for teams and carriages, it shall be of sufficient height and breadth to admit of carriages of the largest size in common use, and high enough for loads of hay, and other similar vehicles usually moved by teams. Under such circumstances what is a reasonable height and width, is partly a question of fact, and partly a question of law; the facts all being found by the jury, what is a reasonable width and height is a question of law; or to express the same thing in other words, what was intended by the parties to be the nature and extent of the right granted, is an inference of law, to be drawn from the terms of the instrument of grant, interpreted and explained by the facts and circumstances thus found by the jury.

When no dimensions of a way are expressed, but the object is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object. In the present case, the dimensions of the way are not expressed; but the purpose for which it was reserved is expressed, and it goes far to enable us to ascertain the dimensions. It was for the purpose of carrying wood, or any other thing, into and from the grantor's "housing and land adjoining, for the use and accommodation thereof." The grantor's adjoining house being a dwelling-house, it is to be limited to articles usually carried to or from a dwelling-house, in its ordinary occupation as such. It thereby excludes the presumption that it was to be adapted to the carriage of merchandise, such as bales, boxes, or casks. Wood must be taken to be fire-wood, and not timber or wood to be used for the purposes of manufacturing. And "any other thing," though in terms of the largest sense, must be construed to mean other thing of like kind used in a dwelling-house; as vegetables, provisions, furniture, and the like. Without examining it more minutely, we are satisfied that the right reserved was that of a suitable and convenient footway to and from the

grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions, and necessaries for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose, in passing to and from the street to the dwelling in the rear, through a foot passage, in a closely built and thickly settled town.

Upon these views of the rules and principles of law applicable to the present case, the court are of opinion that the defendants had a perfect right to build over the said passage way; it being one of the beneficial uses of the property which could be made, and which, as owners, they had a right to make, consistently with the full and free enjoyment of the foot way on the part of the plaintiff.

We think that this opinion is not inconsistent with the opinions heretofore given at *nisi prius*, and by the whole court, though perhaps the point was not stated with sufficient precision for the purposes of deciding definitely the rights of these parties, and putting an end to the long controversy which has subsisted between them. For this purpose, it is necessary to distinguish accurately between an act, which is of itself an infringement of another's right, and an act which of itself is not an infringement of the right of another, but which, in its consequences, may cause a damage to that other. In the former case, no special damage, no actual pecuniary loss need be stated or proved; the law presumes that a party sustains some damage from the infringement of his right, and enables him to maintain an action, whether he have suffered actual damage or not. And in such case, it is often highly proper that a party should bring his action, though he may expect to recover nominal damage only, for the purpose of vindicating his right, and thereby preventing the adverse party from acquiring a right, by long and uninterrupted use: 16 Pick. 247.¹

But there is another class of cases, where although the act complained of may not be unlawful, or, if unlawful, not an infringement of any right of the plaintiff, no action can be maintained without alleging and proving a special and particular damage to the plaintiff; and the damages to be recovered are confined to an indemnity for the loss thus proved to have been sustained. The plaintiff sets forth the act done, and alleges that by means thereof, he sustained the damage complained of, technically called declaring with a *per quod*. As where the plaintiff complained that while he was proceeding along a navi-

1. *Bolivar Mfg. Co v. Neponset Mfg. Co.*

gable creek with his barge laden, etc., the defendant obstructed the creek, *per quod* the plaintiff was compelled to carry his goods around, at a great expense. In such case the action lies for the special damage immediately occasioned by the obstruction; but it would not lie for the obstruction itself, without special damage, because although it was an infringement of a public right, and so was unlawful, yet it was not an infringement of the peculiar right of the plaintiff: *Rose v. Miles*, 4 Mau. & Sel. 101. . So for special damages occasioned by obstructing a highway: *Greasley v. Codling*, 2 Bing. 263. So by a proprietor of land through which a watercourse runs, against a proprietor higher up, where the gravamen of the complaint against the upper proprietor was, that by damming up the water above, it came with greater impetuosity, and thereby injured his banks: *Williams v. Morland*, 2 Barn. & Cress. 910; S. C., 4 Dow. & Ry. 583. But it might be otherwise, where the plaintiff had acquired a right to the water by appropriation, and the complaint was for the infringement of that right: *Bealy v. Shaw*, 6 East, 208. It is manifest, we think, that this distinction has become important in the present case, because a jury have heretofore given one dollar for this item, treating it as a case of mere nominal damages; whereas, the verdict now under consideration assesses that item of damages at three hundred and fifty dollars.

We have stated that the opinion now expressed will not appear, upon strict comparison, to be inconsistent with those formerly expressed, though in the former cases the rule prescribed may have been less precise and definite. It may, therefore, be proper to review them. On the first trial, the jury were instructed as to the passage way, that the reservation in the deed was answered, by giving the plaintiff a passage way as convenient as it was when the reservation was made; that if the present passage way was not so wide as before, and was not open above, yet if it was as convenient, etc.; but that the defendants had no right to narrow or cover the passage, so as to cause serious inconvenience to the owners, etc. The observation of the court, when this part of the case came before them on a motion for a new trial, was, that by the case it appeared that the passage had been narrowed and arched over, and rendered darker and less convenient. And in reference to the instruction to the jury, that so far as the plaintiff had suffered inconvenience from the alteration, he was entitled to recover damage, the court say that this was correct: 20 Pick. 295.

It is manifest we think, that in these remarks, so far as they

related to the dimensions of the passage way, the court considered that the passage way, as it was, in point of convenience, at the time it was reserved, and the width of it, for the purpose for which it was reserved, might be considered as equivalent, and that the one description was used instead of the other. For in this same opinion the court say, that they are satisfied that a convenient right of way was reserved, but that its width was not fixed: 20 Pick. 295. But if it was to be a passage way as it existed at the time of the reservation, its width would have been fixed. In point of fact, as the buildings then stood, the passage used was of irregular breadth, being for a part of the way eight or nine feet wide. As a definition of the plaintiff's right, it would have been more exact to say that it was a right of way suitable and convenient for the purpose for which it was reserved, namely, as a foot way from a public street to a dwelling-house in the rear, and for carrying wood and other articles, incident to the occupation and enjoyment of such a dwelling-house. This admits of any alteration and improvement in the estate over which the easement is reserved, consistent with the preservation and maintenance of the right of passage itself. So it has been held in analogous cases. A grant of water, sufficient to supply a grist-mill, limits the quantity of water, but not the use to which it is to be applied. If, in the progress of improvement in the useful arts, the owner removes the grist-mill, and erects a cotton-factory, it is held that he has a right to do so, taking no more water for his factory than he had a right to take for his grist-mill. Such construction is conformable alike to the rules of law, and to the principles of public policy. The law, carrying into effect the intention of the parties, does not intend to restrict the right of ownership of the real estate subjected, further than is necessary to give full effect to the easement; and public policy requires, as well in cities as elsewhere, that an owner of real estate should be allowed to make all the improvements upon it which can be made consistently with the just rights of others.

So far as the remark of the court applied to the darkening of the passage way, it did not go on the distinction between doing an act, which the defendants have no right to do, by building over the passage way, and doing that which they had a right to do, but doing it in such a manner as to cause some slight consequential damage to the plaintiff. Besides, the damage given by the jury on that ground, being merely nominal, and the instruction not being wrong in point of law, and especially

as the plaintiff was entitled to hold his verdict for other damages, the court had no good reason for setting aside the verdict, even though it might have appeared to them, that upon the evidence, no case for any consequential damages was established in point of fact.

In saying, that the actual condition of the way, at the time of the reservation, is not the measure and definition of the plaintiff's right, it is necessary to guard against two misconstructions of this remark. We do not mean to say, that when a way is actually located and fixed by definite and visible objects, as by buildings or fences, the grant or reservation may not refer to such way actually existing, and that the limits then would not be fixed by the act of the parties themselves. The contrary is true in such case: *Salisbury v. Andrews*, 19 Pick. 250. Even where an estate is granted with all ways "appurtenant," and there is, strictly speaking, no way appurtenant, but there is an actually existing way over the grantor's other land, it shall be taken, that the way actually used and existing, though miscalled "appurtenant," shall pass; because it must be understood that such was the intent of the parties: *Morris v. Edgington*, 3 Taunt. 24. The other misconception, against which we would guard, is this: when it is said, that in such a case as the present, the actually existing state of the passage way, at the time of the reservation, is not the measure or description of the right reserved, we do not mean to say, that such state of the passage way may not be evidence, and often evidence of a very forcible and determinate character, to prove what is reasonable and convenient, and what those most conversant with the matter have, by their practice, shown to be in their opinion most reasonable and convenient, under given circumstances. And this goes far to show what was in the mind of the court, when they seemed to consider the actual condition of the way, at the time of the reservation, as equivalent to the convenient passage way reserved by the deed.

This cause again came before the court in June, 1838. The judge on that trial, had instructed the jury, that as to arching over the passage way, if it did not occasion any inconvenience, by darkening it or otherwise, in respect to the uses for which it was reserved, the plaintiff would not be entitled to any damage on this ground: 20 Pick. 298. This is wholly consistent with the opinion now expressed, but without stating definitely what were the rights of the defendants, as owners, over the passage way, and therefore less explicit, than it might have been useful to state it, under the circumstances. In regard to the breadth,

the jury were instructed, that the defendants were bound to maintain a passage way, equal in breadth to the distance between the old gate-posts, and otherwise convenient for the uses for which it was reserved: *Id.* 299. The former part of this direction was, we think, inaccurate, in taking the distance between the gate-posts as the measure of the plaintiff's rights; but supposing that width and a reasonable width to be practically the same thing, this mode of laying down the rule would lead to no practical error in the result. The opinion of the whole court, on this part of the case, was extremely brief, and we are apprehensive that from its conciseness, or from the implications which it carries, rather than from anything expressed, it may have led to an erroneous application of the rule of law, in the subsequent trial. It is thus stated: "The right of way from Washington street to the rear of the defendants' buildings seems to be definite and certain. The use of it, as it existed in fact from the date of the reservation to the time of the trial, has been satisfactorily ascertained. It was then uncovered. No right to cover it was granted. The jury have found it to be darkened and injured by the arch over it, and have assessed damages for the injury. Of this there can be no complaint:" *Id.* 302, 303.

The way, indeed, was definite and certain as to its direction and the purpose for which it was reserved; and the long use was good evidence of what the parties concerned understood as necessary and convenient. But when it is said, that the passage way was then uncovered, and no right to cover it was granted, especially as the plaintiff claimed a right to have it open to the sky, it may have been understood, though not so expressed, that, without such right granted, the defendants had no such right. We think it could not have been so intended, and that the court did not pass upon that question; especially as the opinion immediately proceeds to state, that the jury have found that it had been "darkened and injured by the arch over it," and assessed damages for the injury. Supposing, then, that the defendants had a right to arch the passage over, yet, if in the exercise of that right, they had done it in such a manner as to injure the plaintiff, and that by means thereof he had suffered special damage, he might recover the damages given in that case, on the principle of the maxim, that every one shall so use his own property and his own right, as not to injure another. This principle may be well illustrated by a recent case. The defendants were erecting a steam-boiler and apparatus on land adjoining the premises of the plaintiff, and by some mismanagement it exploded and

did damage to the plaintiff's buildings. The defendant was held liable: *Witte v. Hague*, 2 Dow. & Ry. 33.

It therefore does not appear whether the damage, given for arching over the passage way, was given for a supposed violation of the plaintiff's right in the estate, or for a supposed consequential special damage done to the plaintiff, in the exercise of the defendants' own right in a careless or improper manner; and there was nothing in the instruction to the jury, under which that verdict was found, to show that it was not given on the latter ground; in which case, there was no reason to set aside the verdict. The amount of the damages was not such as to indicate that the jury might not have proceeded on the latter ground, or to call the particular attention of the court to the distinction between these grounds. We think, therefore, that the question now distinctly brought before the court has not been decided by any of the opinions heretofore given by the court. That question is, whether the defendants had a right to build over the passage way. On that question, for the reasons herein before expressed, the court are of opinion, that the defendants, as owners of the land, had a right to build over the ground on which the passage way in question was reserved; that the plaintiff, under his reserved privilege, had no right to have it open above to the sky, or to any other height, except so far as necessary and convenient for the uses of the foot way reserved, sufficient in height and breadth for the purposes expressed in such reservation.

Having taken this more broad and extended view of the rights of these parties, and the grounds of law on which they rest, it will be the less necessary to take into consideration the particular exceptions to the charge of the judge, upon which the cause now comes before us. So far as the judge charged the jury, that the defendants had no right to arch over the passage, and use the space over it for any purpose of building, such charge was erroneous, and had a tendency to mislead the jury. We are also of opinion, that so far as the judge instructed the jury, that the defendants were bound to keep open a passage way equal in width to the distance between the old gate-posts, it was not strictly correct, although a passage of such width, and one of reasonable width, might not practically differ. We are aware that a similar instruction had before been given at *nisi prius*, but it was before the case had been so fully considered as at present.

For the reasons already given, the court are of opinion that the instruction of the judge was incorrect, so far as he directed

the jury that the defendants were liable for damages if the new passage was rendered more inconvenient, by being covered by reason of its being made a place of resort, or by being darkened, or otherwise.

As to the darkening, we think the jury should have been instructed, that the defendants were not liable for damages, unless, from the length of the passage way, it was so darkened as to render it unfit for the purposes of a passage way. We may conceive of a covered passage of eight or ten feet high, of a length so considerable, that unless openings were left, there would not be light enough admitted at the ends to enable persons to use it with comfort, for the purposes of a passage way. But unless darkened to that extent, it is not a case for damage. It must render the premises to a sensible degree less valuable for the purposes of business: *Parker v. Smith*, 5 Car. & P. 438; *Back v. Stacey*, 2 Id. 465; *Wells v. Ody*, 7 Id. 410; *Pringle v. Wernham*, Id. 377.

We think, also, that the jury should have been instructed that the defendants were not liable for damages by reason of this covered passage being made, to a greater extent, a place of resort by other persons; first, because the consequential damage from that cause is too remote to be made the subject of an action; but more especially, because the plaintiff must either keep the passage closed, and thus prevent the entrance of other persons, or seek his remedy by law, against those who do the actual injury.

One other subject, growing out of this report, remains for consideration. In the present action, the plaintiff claimed damages for injury done to his tenement by darkening an attic window, which overlooked the roof of the defendants' old building. From the manner in which the facts are stated in the report, and the plans exhibited, I am not sure that the court fully understand the question. As we understand it, the complaint is, that the defendants' predecessor, by taking down the old building and erecting another somewhat higher and deeper, that is, further west, has obstructed the window in question, and diminished the air and light formerly received through it into the plaintiff's house. Taking this to be the case, we think it was determined in the former case, and rightly determined. The court did not, on a former occasion, mean to say that where one person, owning two contiguous tenements, grants one to another person, reserving certain easements for the benefit of his own estate, and granting others in his own estate for the benefit of

the estate conveyed, the parties and their successors might not acquire other easements respectively, by grant, or prescription arising subsequently. But the principle was this: that when the enjoyment of a particular privilege may reasonably be referred to a deed, it shall be considered as derived from such deed, and then the just construction of the deed will fix the rights of the parties. In the present case, Haugh, owning two tenements contiguous to each other, granted one in fee to Tew, reserving certain easements. Such right in fee vests in the grantee all the powers of an owner, and of course a right to pull down the buildings and erect new ones; and such right can be restrained and qualified only by express reservation. The deed in question contains this clause: "And it is mutually agreed between the said parties, that whensoever the said Henry Tew (the grantee), his heirs or assigns, are minded to make or add any addition of building backward, he or they shall only make the breadth thereof equal with the breadth of the back of the chimneys of the said tenement hereby granted."

It must be recollected, that building backward was an expression equal to building more westwardly, or more distant from the street. But a restriction against extending in breadth, prohibited the grantee from building more northerly, or in other words, nearer the grantor's other tenement. The case, then, is that of a grantor conveying a tenement adjoining his own; the parties understand that the grantee, as owner, will have a right to alter the buildings, or erect new ones, and they provide, by an express stipulation, that in such event the grantee shall not erect any building nearer than a certain prescribed line to the tenement of the grantor. But no limit is prescribed as to the height of the building. The construction we formerly put on this agreement was, that as *expressio unius exclusio est alterius*, the limitation upon the right of the grantee as to nearness, without any stipulation as to the height of such building, raised a fair implication that no such restriction was intended. And we still consider that this construction of this agreement of the parties was correct. The grantor owned both tenements; he had the full disposing power; he might decline selling at all, and he might prescribe such conditions and limitations as he might think expedient. The more he charged the estate granted with incumbrances and servitudes, the less price he would probably obtain for it. And so, on the other hand, the more liberal the grant, the higher the price. We are then to presume, that when he had the entire power in his own hands, he took care to

protect his own estate, and secure the quantity of air and light necessary to the enjoyment of it, by prohibiting his grantee from building so near thereto as to injure it. If, then, the defendants have not built within the limit so prescribed, or conformably to a former judgment of the court, have removed their building, so far as it was erected within that limit; and if, as we suppose, the darkening of the plaintiff's attic window was occasioned by building higher than the old building, but within the limit thus prescribed by the deed, it was *damnum absque injuria*, and the plaintiff can recover no damage on that account.

Verdict set aside, and new trial granted.

Cited in *Dana v. Valentine*, 5 Metc. 14, to the point that a party may maintain an action, where his rights of property are invaded, without proof of actual damages; in *Bowen v. Conner*, 6 Cush. 137, that a right of way may be created by reservation or exception in a deed, as well as by a deed granting such right of way; in *Pratt v. Sanger*, 4 Gray, 88, that in cases of reservation of right of way the grantee has a right to such a way as is reasonably necessary and convenient for the purposes for which it is granted; in *Codman v. Evans*, 1 Allen, 447, that grantors of an easement are limited to the use granted; in *Proprietors of Locks and Canals v. Nashua & L. R. R. Co.*, 104 Mass. 11, that, for all purposes consistent with the easement granted, the right to use the land remains in the owner of the fee; in *Fox v. Union Sugar Refinery*, 109 Id. 297, that a deed is to be construed most strongly against the grantor. Distinguished in *Welch v. Wilcox*, 101 Id. 164.

WEED v. JEWETT.

[2 METCALF, 608.]

LETTER OF ATTORNEY AUTHORIZING THE ATTORNEY TO RECEIVE AND RECEIPT FOR DEBT due to the constituent from a third person, which contains a clause stating that the letter is an assignment of the debt, will be considered an assignment thereof, although it is not in terms irrevocable, and does not expressly authorize the attorney to receive the money to his own use.

DEBTOR MAY LAWFULLY ASSIGN HIS FUTURE EARNINGS to one of his creditors, and if the employer thereupon agrees to pay to the assignee he can not afterwards be charged as the trustee of the assignor in a process sued out by another creditor.

FOREIGN attachment. The opinion states the case.

R. A. Chapman, for the plaintiff.

J. W. Newcomb, for the trustees.

PUTNAM, J. The plaintiff claims to recover the money due from the Chicopee Manufacturing Company. in virtue of a pro-

cess of foreign attachment; and David M. Bryant claims the same by force of a power and assignment.

It appears that Jewett (the debtor) was a laborer employed by the company, and that he by an instrument under his hand and seal, appointed Mr. Bryant to be his lawful attorney, "for me" (as it is expressed), "and in my name to ask for, receive, demand and receipt for all sums of money that may now be due to me from the Chicopee Manufacturing Company, etc., for labor performed in their service," etc., "this being an assignment of the same." It was contended, on the part of the plaintiff, that this should be construed to be a mere authority to receive the money for the constituent, and not an assignment of the same. That it was misnamed an assignment; but that the legal effect of the instrument is a power without an interest. But we can not think so. The instrument authorizes Bryant to receive and discharge the debt, and then declares, in effect, what shall be done with the money. No particular form of words is necessary to constitute an assignment. It may be quite sufficient to transfer the property, although the word "assign" should not be used. In *Gerrish v. Sweetser*, 4 Pick. 374, a power irrevocable to recover, etc., in the name of the constituent, but for the use of the attorney, was held to be an assignment. In the instrument under consideration, it is not said, in so many words, that the power should be or was irrevocable; but that quality would necessarily be inferred, if the property was by the deed intended to be transferred. The grantor or assignor could not revoke it; but on the contrary the courts of law would not protect it, and sustain an action in the name of the assignor, for the benefit of the assignee: See 19 Wend. 74.¹

It is not said, in so many words, that the attorney might receive the money for his own use; but that is necessarily to be inferred from the words which were used, viz., that the instrument was an assignment; and if so, the assignee of course was to have the property for his own use.

But it was contended, that there was no consideration expressed in the instrument, and so that it should be considered as void—certainly against creditors. But it has been repeatedly held, that parol proof of the consideration may be given, although it be not expressed. And in the case at bar, the debt of the assignor, which was due to the assignee at the time of the assignment, to an amount exceeding the claim assigned, is to be considered a good and legal consideration for the transfer. And it

1. *People v. Tioga C. P.*

appears from the answer of the agent of the company, that they assented to the arrangement which was made, as above stated, between Bryant and his debtor. They undertook to pay to Bryant all the money due, and all that should become due, for the labor, etc., of the debtor. A payment to the debtor afterwards would have been ineffectual. Bryant only could give a valid discharge for it to the company.

But it was argued for the plaintiff, that as the instrument was dated on the second of March, 1839, and the writ was served on the twelfth, no part of the debt, which accrued between the second and the twelfth, could be covered by the assignment.

The case stands thus, in relation to that point, Jewett was indebted to Bryant, and he agreed to work for Bryant's account, at the factory of the company, and they agreed to pay Bryant accordingly. This was a proper subject of contract or agreement, and when the labor was performed the company were bound to pay according to their undertaking.

Trustees discharged.

Cited in *Emery v. Lawrence*, 8 Cush. 154, and in *Boyle v. Leonard*, 2 Allen, 408, to the point that an assignment of future wages is valid.

BURDEN v. THAYER.

[8 METCALF, 76.]

WHERE OWNER OF LAND LEASED FOR TERM OF YEARS MORTGAGES THE SAME, the mortgage transfers to the mortgagee the reversion, to which the rent is incident, and if he gives notice to the lessee of his right thereto, the latter will thereafter be liable to pay to him all rents that become due after the date of such conveyance and notice. But the mortgagee can not recover from the lessee rent which became due prior to the execution of the mortgage.

ATTORNMEN IS NO LONGER NECESSARY TO ENABLE PURCHASER OF REVERSION to maintain against the lessee an action of debt for rent.

RENT DUE AND IN ARREAR AT TIME OF EXECUTION OF MORTGAGE of the premises, out of which it accrued, does not pass by the conveyance of the land, but is a mere chose in action, which the grantee can not maintain an action in his own name to recover, although his grantor has assigned it to him.

DEBT for rent. The opinion states the case.

Washburn, for the defendants.

Barton, for the plaintiff.

By Court, SHAW, C. J. Upon the case stated, it appears that

in 1833, William Capron, being owner of the estate, leased the same to the defendants for a term of twelve years from April 1, 1833, at a rent of one hundred and thirty dollars, payable annually on the first of April each year during the term. On the fifth of April, 1837, said Capron mortgaged the leased premises to the plaintiff, to secure the payment of two thousand two hundred and fifty dollars, in one year from date, which has never been paid. In May, 1837, the plaintiff gave notice of this mortgage to the defendants. The defendants have paid to the plaintiff the annual rents due April 1, 1838 and 1839, which accrued after the mortgage to the plaintiff; but they refuse to pay the rent due April 1, 1837, which became due and payable to Capron, the lessor, five days before his mortgage to the plaintiff; and the question is, whether the plaintiff is entitled to recover that year's rent. The mortgage from Capron to the plaintiff described the premises as under lease to Thayer & Fairbanks, for a term of years, and adds: "Should the conditions of the mortgage be broken, the rents, dues, and demands of every kind arising out of said leased premises, due or becoming due, shall be paid to said Burden, his executor, and all the leases shall be assigned to him, and he is authorized to demand and receive the same in his own name, or that of said William Capron, and proceeds appropriated to the payment of said mortgage."

The court are of opinion, that the plaintiff has no right to recover the year's rent which fell due and was payable, and in arrear, when he took his deed of Capron. When a man takes a deed, either by way of absolute conveyance or mortgage, of an estate which is under a lease for years, he must take such estate as his grantor had; which, in that case, is a reversion—the estate subject to the lease. But the rent is incident to the reversion and passes with it, and the grantee or mortgagee, by force of the conveyance, has a right to receive all rent accruing upon the estate; it is a part of the realty and passes by the deed. But when rent is payable quarterly or yearly, the annual or quarterly payments are not to be apportioned. If the reversion is transferred before the time at which the rent becomes due, the right to such quarter's or year's rent passes with the reversion. In the present case, had the year's rent become due five days after, instead of five days before the mortgage to the plaintiff, it would have passed by it to the plaintiff. The rule is well expressed in Cruise's Digest, tit. 28, c. 1, sec. 65. The right to a rent service is real estate descendible to the person who is en-

titled to the reversion. But from the moment that a payment of rent becomes due, it will go to the lessor's executor.

Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by statute 4 Anne, c. 16, sec. 9, a grant of the reversion is good and effectual without attornment: *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the revolution, and this provision being a rule in amendment of the common law, we may probably consider it in force here: *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures, which were in use under our former government: *Farley v. Thompson*, 15 Id. 25, 26. The general principle, that all future accruing rent passes with the reversion, is confirmed by the case of *Birch v. Wright*, 1 T. R. 378. These principles apply to all effectual conveyances of the reversion, whether by absolute deed or by mortgage. Then let us apply them to the case of a mortgage of an estate under lease, and with reference to other cases determining the relative rights of mortgagor and mortgagee.

It is now well settled, that a mortgage in fee transfers presently all the title which the mortgagor has in the estate; and this includes the right to enter and hold possession of the estate, even though the mortgage is given to secure the payment of a debt at a future day, unless there is some stipulation that, until a breach of the condition, the mortgagor shall hold possession. In such case, the rents and profits of the mortgaged premises constitute a part of the fund pledged for the payment of the principal and interest of the debt to be secured; and must be accounted for by the mortgagee: *Newall v. Wright*, 3 Mass. 138 [3 Am. Dec. 98]. But in such case, it is optional with the mortgagee, whether he will enter or not; and in general if the estate is ample security for the debt and interest, it is not for the interest of the mortgagee to incur himself with a liability to account; and therefore it commonly happens, that in case of a mortgage in fee, the mortgagor is left in possession.

But in case the premises, at the time of the mortgage, are under lease for a term of years, the mortgagee can not disturb the possession of the lessee, who has a prior title; and therefore he can not enter. But as the mortgage transfers the reversion, to which the rent is incident; as it binds the whole of the realty,

of which the rents afterward accruing are a part; he may give notice of his right to the lessee, and of his election to take the rents; and then the lessee becomes bound to pay the rent to him as mortgagee. But if he does not elect to take the rents and account for them, then, in analogy to the right of a mortgagee in fee to enter or not, at his election, the mortgagee of a reversion may forbear to give notice to the lessee; and in that case, the lessee will be protected in paying the rent to the mortgagor. And so it seems to be provided by the statute of Anne before cited, that no tenant shall be prejudiced by the payment of rent to his landlord, until he has notice of the transfer of the reversion. This, it is strongly intimated by Mr. Justice Buller, in the case of *Birch v. Wright*, 1 T. R. 385, would have been the rule of the common law, if no such proviso had been expressed in the statute.

But it seems to be extremely well settled by the cases, that the rent, which became due and was in arrear at the time of the assignment of the reversion, whether absolutely or by way of mortgage, was a part of the personalty due to him who had the reversion when it accrued, and did not pass to the grantee or mortgagee of the reversion: *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 T. R. 378; *Fitchburg Cotton Mfg. Corp. v. Melven*, 15 Mass. 268; *Demarest v. Willard*, 8 Cow. 206. To apply these rules to the present case, it results, that at the time the rent now in question fell due, April 1, 1837, William Capron was the holder of the reversion in his own right, and by force of the lease was entitled to the rent. It then became a debt to him, a chose in action, and did not pass by the mortgage to the plaintiff. But as the plaintiff did give notice to the tenant in May, which was before another year's rent became due, he acquired a right to the rent which accrued April 1, 1838, although it was before condition broken. This, however, is stated on the assumption that there was no stipulation in the mortgage, that the mortgagor should retain possession until condition broken. This is not stated in terms, but we take it for granted, though not now material to this case, because that year's rent has been paid into court, by the defendant.

But another ground is taken in argument, arising out of the special terms of the mortgage, as above cited. It is contended that by force of that special clause, Capron assigned to the plaintiff rents, dues, and demands arising out of said leased premises, due, or becoming due, etc. It may well be doubted whether this did not look to the contingency of the condition

being broken by the non-payment of the debt, and mean to transfer to the mortgagee such sums as should be then due. But the decisive answer is, that this, if available at all, was nothing more than the assignment of a chose in action. The year's rent then due and in arrear was a debt, and though it arose out of the land, yet had become wholly detached from it. All the above authorities, which go to show that it had ceased to be part of the realty, and that it did not pass by the conveyance of the land, establish the point, that it was a mere chose in action. Being so, it can not be recovered by the plaintiff in his own name, whatever equitable right he may have to claim it, in the name of the assignee: *Willard v. Tillman*, 2 Hill, 274.

According to the terms of the report, the order must be, that a new trial be granted; but as this opinion is decisive of the plaintiff's case, the proper course will be, if the plaintiff consent, to enter a nonsuit.

ENTRY OF MORTGAGEE AND DEMAND OF PAYMENT OF RENT to him will entitle him to the rent: *Stone v. Patterson*, 31 Am. Dec. 156, note 157.

THE PRINCIPAL CASE IS CITED in *Mass. H. L. Ins. Co. v. Wilson*, 10 Metc. 127; *Warner v. Bacon*, 8 Gray, 408; *Russell v. Allen*, 2 Allen, 44; *Nicholson v. Munigle*, 6 Id. 216; and in *Grundin v. Carter*, 99 Mass. 16, to the point that when a mortgage is made subsequently to an existing lease, the rents pass as incident to the reversion; and if at the time possession is taken there is rent accruing upon a quarter not expired, the rent passes as incident, and the mortgagee may maintain an action for it. But the rent which has accrued prior to the entry does not pass as incident, but is merely a chose in action. And in *Dunshoe v. Grundy*, 15 Gray, 315, it is cited to the point that where a sublessee, on an assignment by his lessor of his lease, requested the assignee to permit him to continue in possession, and he did so, and paid rent, no other attornment is necessary to establish the relation of landlord and tenant between them. It is also cited in *Russ v. Alpaugh*, 113 Mass. 374, to the point that the provision of the stat. 4 and 5 Anne, c. 16, sec. 21, concerning grants of reversions without attornment of the tenant, has been adopted in Massachusetts.

PARKER v. PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER.

[3 METCALF, 91.]

DEED OF DISSEISEE, WHILE THE DISSEISIN IS STILL SUBSISTING, conveys no title.

DISSEISIN OF ONE CO-TENANT BY ANOTHER, WHAT AMOUNTS TO.—Where one co-tenant conveys the whole estate, and the grantee records the deed and enters into open and notorious possession, claiming title to the entire estate, this will amount to a disseisin by such grantee, of the other co-tenants.

WRIT of entry. The opinion states the case.

Greenleaf and G. Parker, for the demandant.

S. Hoar and Hopkinson, for the tenants.

By Court, WILDE, J. The principal question, on which the decision of this case depends, relates to the title set up by the tenants. The question is whether, upon the facts reported, they have made out a good title by disseisin, commencing before, and continuing until, the time when the demandant purchased the premises of several of the heirs of Joseph Moors, who was the undisputed owner of a parcel of land, including the demanded premises, and died seised of the same. Unless, therefore, the heirs were disseised, when they conveyed to the demandant, his title is clearly good and the action is well maintained. On the contrary, if the demandant's grantors were disseised when they made their conveyances to him, it is equally clear that their title did not pass by those conveyances, and the tenants' title must prevail. That the deed of a disseisee, the disseisin still subsisting, is inoperative to convey the title, is a familiar principle of the common law, which can not be controverted. And on this principle, the counsel for the tenants maintain the defense; contending that they have given clear and conclusive evidence of the disseisin of the heirs of Joseph Moors, under whom the demandant claims title.

By the report of the evidence, it appears that Joseph Moors was a *non compos*, and that Moses Hale was his guardian, and occupied the Keyes pasture lot, including the demanded premises, during the life of Moors, and after his death; it being inclosed with other lands, owned and occupied by the said Hale, lying upon each side of it: That after the death of Moors, Hale purchased of several of his heirs their rights in the pasture, and soon after conveyed the whole of it to Nathan Tyler, with the usual covenants of seisin and of warranty against the lawful claims and demands of all persons.

The evidence thus far, we think, does not show any possession adverse to the title of Moors or his heirs. During his life, his guardian had the right of occupation, and after his death, if his guardian continued his occupation, the presumption is, that it was for the benefit of the heirs; and this presumption is confirmed by his purchasing the shares of several of the heirs soon after. If, before that purchase, Hale's possession was adverse, so as to amount to a disseisin, the disseisin would be purged by that purchase. His subsequent possession must be consid-

ered as the possession also of the other heirs, from whom he had not obtained a title. If a person enters on land, having no right or title, and maintains the exclusive possession, taking the rents and profits, his possession would be considered adverse, and, if of sufficient notoriety, would amount to a disseisin. But if a person enters, having a title, and a right to enter, his entry and possession are presumed to be in conformity to his title. No man is presumed, without evidence, to have done, or to have intended to do an unlawful act. If then a tenant in common enters on the common property, and takes the whole rents and profits without paying over any share thereof to his co-tenants, his possession is not to be considered adverse to them, but in support of the common title. Lord Mansfield says that a refusal to pay such shares is not sufficient evidence of an ouster, without denying the title: Cowp. 218.¹ It is true, that if a tenant in common continues in possession for a great length of time, without interruption or claim by the other tenants, this would be evidence from which a jury would be authorized to infer or presume an actual ouster; and so on similar evidence a grant may be presumed. But there is no ground for any such presumption or inference in the present case. The only evidence tending to show that Hale intended to hold the premises adversely to his co-tenants, is his deed to Tyler, in which he undertakes to convey the whole estate; and the material question is, whether this conveyance, and the entry and possession of Tyler claiming under it, are sufficient in law to constitute a disseisin.

It was proved at the trial, that Tyler, immediately after his purchase from Hale, went into possession and occupation of the granted premises, and continued his occupation, without interruption or claim of any one, until he conveyed the same to Thomas M. Clark, with the usual covenants of seisin and warranty, as he purchased the same from Hale. During this time (a period of more than six years), he occupied the lot as a pasture, cut down the bushes, made a division wall between that and an adjoining lot, and one year plowed it and sowed it with rye. These facts, being admitted, are in the opinion of the court, conclusive proof of the adverse possession of Tyler, and show a disseisin of the heirs of Moors, under whom the demandant claims. For although the right and title of those heirs did not pass by the conveyance from Hale to Tyler, yet the deed purported to convey the whole estate. Tyler purchased the whole, with a warranty of a good and indefeasible title, and he

1. *Fisher v. Prosser*.

sold it afterwards with the same warranty. The presumption is, that he intended to hold the estate in conformity to his purchase; and there is no evidence to rebut the presumption.

It does not appear that Tyler had notice or knowledge of the defect in his title. But whether he had such knowledge or not, it is very clear that he was in possession, claiming the entire title; and this undoubtedly was an adverse possession, which, being open and notorious, amounts to a disseisin. To constitute a disseisin, it is not necessary, at the present day, to prove the forcible expulsion of the owner; nor is it necessary for a tenant in common to prove an actual ouster of the co-tenant. If he enters, claiming the whole estate, the entry is adverse to the other tenants. The intention so to hold the estate must be manifest, as it is in the present case; and the open and notorious possession of Tyler was constructive notice of a claim adverse to those heirs of Moors who had not conveyed their title. If they had notice by the deeds to Hale, and by him to Tyler (which were duly recorded), they must have known that the latter never entered as tenant in common, but that he entered as purchaser of the entire estate.

That this adverse entry and possession, claiming the whole estate, constitute a disseisin, is fully maintained by the cases cited by the tenants' counsel, and by all the modern authorities. The doctrine is fully discussed by Story, J., in *Prescott v. Nevers*, 4 Mason, 330. In that case, as in this, the defendant had a deed of the whole estate, but his title was only valid as to an undivided quarter part, in common with other owners. But he made an actual entry into the whole, claiming the entirety in fee and of right. And it was held, "that his acts of ownership were such as amounted to a disseisin of the co-tenants; for he entered as sole owner, and his possession was openly and notoriously adverse to them." "There can be no legal doubt," as it is said by the court in that case, "that one tenant in common may disseise another. The only difference between that and other cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, susceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent with which they are done, and their notoriety." We consider this a sound distinction, and it is fully supported by the authorities.

In the case of *Clapp v. Bromagham*, 9 Cow. 530, which was in all respects substantially similar to the present case, the same

decision was made, and the same doctrine of disseisin was laid down by Chancellor Jones, who discussed the subject very fully and very ably. The English authorities, cited in that case, fully support the distinction laid down by Story, J., in *Prescott v. Nevers*. So in the supreme court of the United States, in *Ricard v. Williams*, 7 Wheat. 121, the same distinction was laid down. The court say "an ouster or disseisin is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right."

By these and other authorities which might be noticed, if necessary, the doctrine of disseisin, as it has been held, seems to be well settled. To constitute a disseisin, actual force is not necessary; but open and exclusive possession, accompanied with acts of ownership, manifesting the intention to hold the whole estate adversely to the title of the true owner, is sufficient. Such a notorious adverse possession is considered as a constructive ouster, and is equivalent to an actual expulsion. The doctrine is founded on a reason similar to that assigned as the ground of the ancient doctrine of disseisin by the operation of a grant; which was founded principally on the notoriety of such a conveyance. We are therefore of opinion, upon the facts reported, that the demandant's grantors, before their conveyances to him, had been disseised by Tyler; that this title by disseisin passed by his conveyance to Clark, and from Clark, through several intermediate conveyances, to the tenants. They leased the pasture from time to time, to sundry persons, who continued the open and notorious occupation of the same, and one of whom was in the exclusive possession and occupation at the time of the conveyances to the demandant: 1 Shepley, 337.¹

It has been argued that the tenants are estopped to set up this title by disseisin, by the deeds of the heirs of Moors, who conveyed, on the twenty-sixth of September, 1815, their shares in the estate to Hale; but we think very clearly, that the title by disseisin is derived from Tyler, and that no act of Hale, either before or after his conveyance to Tyler, can, on any ground, defeat the tenants' title. The conclusion is, that as the demandant's grantors were disseised when they undertook to convey their rights to him, their deeds were inoperative to convey any estate to him, and his title therefore wholly fails.

Demandant nonsuit.

PUTNAM, J., did not sit.

1. *Thomas v. Pickering*.

OUSTER OF ONE CO-TENANT BY ANOTHER: See note to *Porter v. Hooper*, 29 Am. Dec. 484, 485; *Lodge v. Patterson*, 27 Id. 335, note 337, 338; *Thomas v. Garvan*, 25 Id. 708, note 709; *Den v. Webb*, Id. 711, note 714; *Town v. Needham*, 24 Id. 246, note 255; *Jackson v. Whitbeck*, 16 Id. 454, note 456; *Gillaspie v. Osburn*, 13 Id. 136, note 140, where the subject is discussed at length; *Doolittle v. Blakesley*, 4 Id. 218; *Lafavour v. Homan*, 3 Allen, 355, citing the principal case.

DISFEISIN OF ONE CO-TENANT BY ANOTHER: See note to *Barnard v. Pope*, 7 Am. Dec. 228; *Mott v. Alger*, 15 Gray, 324, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Sumner v. Stevens*, 6 Metc. 339, to the point that adverse possession continued for twenty years takes away the owner's right of entry; in *Dodge v. Nichols*, 5 Allen, 551, to the point that a tenant in common may be disseised, and that a conveyance by a disseisee is unlawful and void; in *Samuels v. Borrowdale*, 104 Mass. 210, to the point that an actual, exclusive, open, and notorious possession is sufficient to constitute a disseisin; in *Johnson v. Bean*, 119 Id. 272, to the point that adverse possession continued long enough ripens into a good title by presumption of grant.

TRULL v. EASTMAN.

[8 METCALF, 121.]

WHERE AN HEIR APPARENT CONVEYS HIS ESTATE IN EXPECTANCY and covenants in the deed, that neither he nor those claiming under him, will ever claim any right in such estate, this covenant, which amounts to a warranty, will bar him and those claiming under him, when the right descends.

RELEASE OF ALL RIGHT, TITLE, OR INTEREST OF RELEASOR in his father's estate, whether the same fall to him by will or heirship, embraces all the right which he may afterwards acquire as well as what present right he has.

REAL action. The facts sufficiently appear from the opinion.

B. Rand, for the demandant.

Hopkinson, for the tenants.

By Court, PUTNAM, J. The demandant seeks, by a recovery in this action, to defeat a family arrangement, made by him and his brother Phinehas, now deceased, with the consent and knowledge of their father. And in this respect this case is like that of *Fitch v. Fitch*, 8 Pick. 480, wherein it was held, that a covenant by an heir expectant that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without any advantage being taken of the covenantor.

In the case at bar, the agreement between the brothers, John and Phinehas, was made upon a good and legal consideration.

The price, which Phinehas was to pay to John for his right in expectancy to his father's estate, was ascertained by disinterested referees; and the money was paid to and received by the demandant accordingly. Whereupon the deed, mentioned in the statement of facts, was made by the demandant to Phinehas. The tenants have the same right to the estate which Phinehas had, and which he could have and maintain if he were living. And the question upon the whole matter is, whether the demandant is by law entitled to recover. It has been contended for him, that no estate passed from him by his deed to his brother: That it was a mere expectancy, and that the deed could operate on the realty only to convey the present right; and that the covenant should be restrained or limited in such manner, as that the grantor and those under him, should not claim any part of the estate thereafter, which he then had; but that he should be permitted to acquire, by grant or devise, any right to the estate thereafterwards, to his own use. And if that were the true construction of the deed, the consequences would follow. It may be conceded that the covenant should be limited to the premises—the subject-matter of the conveyance. And it is perfectly clear, that the premises in that deed embraced what right the grantor should thereafterwards acquire, as well as what present right he had. It is well settled, that if the heir releases with warranty, it bars him when the right descends. In Co. Lit. 265 a, the law is clearly laid down: "If there be a warranty annexed to the release, then the son" (who released living the father) "shall be barred. For albeit the release can not bar the right, for the cause aforesaid" (viz., that the releasor had no present interest), "yet the warranty may rebut and bar him and his heirs of a future right which was not in him at that time:" See also Fitzg. 235.¹

Now the covenant, in the case before us, was in effect a covenant real. The law does not require any particular form of words to constitute such a covenant, which shall run with the land. In *Fairbanks v. Williamson*, 7 Greenl. 96, it was held, that a covenant that neither the grantor nor his heirs should make any claim to the land conveyed, was a covenant real, which ran with the land. In effect it is a warranty, that the grantor will not, and that his heirs and assigns shall not, thereafterwards claim the premises granted or released, or any part of the same. And although the grantor or releasor had not then a present right, yet the subsequent acquisition of it shall

1. *Arthur v. Bockenham*.

inure to the use of the grantee; or, in the better words of Lord Coke, the grantor shall be rebutted and barred, when he afterwards shall so claim against his own warranty. There is nothing to the contrary in the case of *Comstock v. Smith*, 13 Pick. 116 [23 Am. Dec. 670], cited by the demandant's counsel. The grantors, in that case, conveyed all their right, title, and demand in the premises, with warranty against all persons claiming by, from, or under them, and not otherwise. The court construed that to be a conveyance of the interest and right which the grantors then had; and of course that it should not conclude them from subsequently purchasing or acquiring a title to the same estate. But, in the case at bar, the deed from the demandant to his brother expressly embraced future rights to be acquired. Indeed, those rights were the substantial matter relating to which the deed and the covenant were made.

Demandant nonsuit.

GRANT BY HEIR APPARENT OF HIS INTEREST IN HIS ANCESTOR'S ESTATE, executed while the ancestor is living, is inoperative as a present conveyance: 3 Wash. R. P. 348 (4th ed.); 4 Kent Com. 261; *Stover v. Eycleshimer*, 46 Barb. 84; approved in 3 Keyes, 620; *Davis v. Hayden*, 9 Mass. 519; *Dart v. Dart*, 7 Conn. 256; *Bayler v. Commonwealth*, 40 Pa. St. 37; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Waldron*, 13 Wend. 178; Litt., sec. 446; Co. Litt., sec. 265 a; *Jones v. Roe*, 3 T. R. 88, 93.

But although a conveyance of an expectancy, as such, can not be made at law, such a conveyance may be enforced in equity as an executory agreement to convey, provided it be entirely fair, and sustained by an adequate consideration: *Bayles v. Commonwealth*, 40 Pa. St. 43; *Stover v. Eycleshimer*, 46 Barb. 84; approved on appeal, 3 Keyes, 620; *Hobson v. Trevor*, 2 P. Wms. 191; *Beckley v. Newland*, Id. 182; *Wright v. Wright*, 1 Ves. sen. 409; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, Id. 183; *Lyde v. Mynn*, 4 Id. 505; S. C., 1 Myl. & K. 683; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Power's Appeal*, 68 Pa. St. 443; *Jenkins v. Stetson*, 9 Allen, 128; *People v. Dannat*, 77 N. Y. 45. Judge Story says on this subject: "So even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such a case, if made *bona fide*, for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract:" 2 Story Eq. Jur., sec. 1040, c. And in a preceding section the same learned author said: "Courts of equity will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not indeed as a present positive transfer operative *in presenti*, for that can only be of a thing *in esse*; but as a present contract to take effect and attach as soon as the thing comes *in esse*:" Id., sec. 1040. So Lord Chancellor Westbury, in delivering his opinion in the house of lords, in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 211, said: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the

contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree a specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

AFTER-ACQUIRED TITLE, ACQUISITION OF BY ESTOPPEL.—But, even at law, the grantee of one who has at the time of the conveyance no title, may, if the deed be with warranty, acquire the estate which his grantor subsequently obtains in the land. This subsequently acquired title inures to the benefit of the grantee, on the principle of estoppel, and to avoid circuitry of action. In discussing this question, Chancellor Kent says: "The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the grantee, or his assignee, by way of estoppel, from the moment the estate comes to the grantor, and creates a perfect title as against the grantor and his heirs. The estoppel works an interest in the land. An ejectment is maintainable on a mere estoppel. If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will inure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantor, under his after-acquired title, is equally estopped, and the estoppel runs with the land:" 4 Kent Com. 98. And Shaw, C. J., in delivering the opinion of the court in the case of *Cole v. Raymond*, 9 Gray, 218, said: "It is a well-established rule of law, that although a deed, as a present conveyance, transfers only the title which the grantor then has, yet if it is a deed in fee, with warranty, it has a further operation as a covenant real running with the land, by which the grantor and his heirs are bound to make it good. So that if the grantor has no good and sufficient title to the estate, yet if he or they afterwards acquire a good title, it forthwith inures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel, if the action be brought in such form that it may be pleaded by way of estoppel; otherwise by way of rebuttal to the claim of any one bound by such warranty." The doctrine on this subject here laid down has been declared by some writers to be based upon a misconception of the older English authorities, and to be incorrect in principle. See American notes to 2 Smith's Lead. Cas. 275 *et seq.*; Rawle on Covenants, pp. 266 *et seq.*, 384 *et seq.* But whatever doubts may exist as to the origin of the rule, it is now too firmly established in this country to be likely to be repudiated. The following cases fully sustain the rule as laid down in the extracts quoted from Kent and Shaw: *Knight v. Thayer*, 125 Mass. 25; *Irvine v. Irvine*, 9 Wall. 625; *O'Bannon v. Paremour*, 24 Ga. 493; *Jarvis v. Aikens*, 25 Vt. 635; *Bank of Utica v. Mersereau*, 3 Barb. Chan. 528; *Jackson v. Hubble*, 1 Cow. 613; *Gochenour v. Mowry*, 33 Ill. 331; *King v. Gilson*, 32 Id. 348; *Reese v. Smith*, 12 Mo. 344; *Jackson v. Wright*, 14 Johns. 193; *Kimball v. Schoff*, 40 N. H. 190; *Crocker v. Pierce*, 31 Me. 177; *Churchill v. Terrell*, 1 Bush, 54; *Broadwell v. Phillips*, 30 Ohio St. 255; *Wiesner v. Zaun*, 39 Wis. 188; *House v. McCormick*, 57 N. Y. 310; *Burtner v. Keran*, 24 Gratt. 42; *Power's Appeal*,

63 Pa. St. 443; *Washabaugh v. Entriken*, 34 Id. 74; *McCusker v. McEvoy*, 9 R. I. 528; S. C., 11 Am. Rep. 295; *Doe v. Dowdall*, 3 Houst. 369; S. C., 11 Am. Rep. 757; *Comstock v. Smith*, 23 Am. Dec. 670, and note 673, where other cases to the same effect are cited and collected. And in *Clark v. Slaughter*, 34 Miss. 65, it was decided that where a husband sold a slave belonging to his wife, who afterwards died without issue, leaving him her heir, the title of the purchaser thereby became perfect. But a mere release or quitclaim deed of land will not estop the grantor or releasor from setting up a title subsequently acquired, against his grantee or releasee: *Bell v. Twilight*, 26 N. H. 401; *Jackson v. Wright*, 14 Johns. 193; *Clark v. Baker*, 14 Cal. 612; *Pelletreau v. Jackson*, 11 Wend. 110; *Kinsman v. Loomis*, 11 Ohio, 475; *Pike v. Galvin*, 29 Me. 183; *Harriman v. Gray*, 49 Id. 537; *Dorris v. Smith*, 7 Or. 267, 275; *Graham v. Graham*, 55 Ind. 23; *McAllister v. Devane*, 76 N. C. 57.

WHAT AMOUNTS TO WARRANTY.—The case of *Fairbanks v. Williamson*, 7 Greenl. 96, so far as it holds that a covenant of non-claim is a covenant real which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto, was overruled in the case of *Pike v. Galvin*, 29 Me. 183. The decision in the last-mentioned case was, that where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure to the grantee; nor will the grantor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance. The court in this case seem to regard the covenant of non-claim as not amounting to a covenant of warranty. But Mr. Rawle, in his work on Covenants, page 216 (4th ed.), says: "So too with respect to a covenant already noticed as sometimes employed on this side of the Atlantic, but rarely, if ever, in England, called the covenant of non-claim. As a general rule, no distinction has in any way been taken between this covenant and the ordinary covenant of warranty. Both are, in general, held to have the same operation by way of estoppel, both equally possess the capacity of running with the land, and confer the same rights as to a recovery in damages." In the subsequent case of *Cole v. Lee*, 30 Me. 392, no distinction was observed between the covenant of non-claim and that of warranty. And in the still later case of *Curtis v. Curtis*, 40 Id. 24, it was decided, following on that point the authority of the principal case, that a release by an heir apparent, of his estate in expectancy, with a covenant of non-claim, is, if made fairly, and with the consent of the ancestor, a bar to the releasor's claim thereto, by descent or devise, after his ancestor's death. Generally speaking, the covenant of non-claim is treated as equivalent to the ordinary covenant of warranty: *Lamb v. Kamm*, 1 Saw. 238, 242; *Kimball v. Blaisdell*, 22 Am. Dec. 476; *Gee v. Moore*, 14 Cal. 472; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297.

HUNT v. HUNT.

[3 METCALF, 175.]

DEMANDANT IN WRIT OF RIGHT MAY RECOVER UNDER TITLE BY DISSEISIN, unless the tenant can show a better title.

DARRERIN SEISIN IS A GOOD PLEA in a writ of right.

WHERE SON, ON HIS FATHER'S BECOMING INSANE, TAKES MANAGEMENT of his farm, with the consent of the mother and the rest of the family, he is considered as occupying under his father, and the profits taken by him

during his father's life-time are considered as taken for the latter's use and benefit. And in such a case the seisin of the father will be considered as continuing up to the time of his death.

WHERE A FATHER BECAME INSANE AND ONE OF HIS SONS TOOK THE MANAGEMENT of his farm during the rest of his father's life-time, and remained in possession of it for thirty years afterwards, these facts do not warrant a presumption of a conveyance to him by the father, or of a release to him by the other heirs, subsequent to their father's death.

Writ of right. The demandant was the son of the John Hunt mentioned in the opinion, and the tenant was the widow and devisee of Ebenezer Hunt, another son of said John Hunt, and who is also mentioned in the opinion. Said John Hunt was sometimes insane and sometimes capable. Ebenezer managed the farm when his father was insane, and when the latter was sane he managed it himself. There was a verdict taken for the demandant, subject to the opinion of the whole court upon the facts and evidence. The other facts appear from the opinion.

Robinson and Choate, for the tenant.

Farley and R. G. Colby, for the demandant.

By Court, WILDE, J. This is a writ of right, in which the demandant demands possession of an undivided fourth part of a certain tract of land described in the writ. The action was commenced in the year 1839, before the limitation of real actions by the Rev. Stats., c. 119, took effect. The demandant counts on the seisin of John Hunt, his father, within forty years before the commencement of the action; and the first question to be decided is, whether the seisin of John Hunt is satisfactorily proved by the evidence reported. No record title in John Hunt nor in any other person was produced at the trial; but it was proved by sundry aged witnesses, that from seventy to eighty years since, and as far back as the memory of any of the witnesses extended, the farm in question was in the possession and occupation of the said John Hunt; that he lived on it with his wife and children, taking the profits, and continued his residence there, until his death in 1807. There is no evidence of any prior possession or elder title; and it can not be doubted that proof of such an ancient and long-continued possession and occupation is good *prima facie* evidence of a seisin in fee simple. In a writ of right, as well as in a writ of entry, a title by disseisin is a good and sufficient title, unless a better can be shown by the tenant: Lit., sec. 478. If, then, John Hunt had no better title, he had a good title by disseisin; for we consider the evidence as establishing

the fact beyond controversy, that he was in possession of the premises for more than forty years, and died seised; for there is no proof that he was disseised by his son Ebenezer, under whom the tenant claims. His possession was not adverse, and must be presumed to be under his father; and if he had concurrent possession with his father, that certainly would not constitute a disseisin.

It has been objected, that since the time when Ebenezer first began to take the principal management of the farm, the esplees were taken by him; but considering him as occupying under his father, this is not a valid objection. The taking by the tenant is the taking by the landlord: 4 Dane's Abr. 29, 30. And from the whole evidence, there can be no question that the possession or occupation by Ebenezer was by the permission of his father, so far as he was capable of giving permission, and with the acquiescence of his mother and the rest of the family. We are of opinion, therefore, that the seisin of John Hunt continued up to the time of his death, and that during his lifetime, the profits of his farm must be considered as taken by him, or for his use and benefit.

The next question to be determined is, whether Ebenezer Hunt had, after the death of his father, gained a good title by disseisin. He continued in the possession of the premises for more than thirty years after that event; and the tenant's counsel contend that he thereby gained a good title, by disseisin, against the other children and heirs of John Hunt. This question involves another, namely, whether the plea of darrein seisin is a good plea in a writ of right. This is said to be doubtful; but the grounds of doubt do not seem to be stated with precision, nor to be satisfactory. Roscoe, in his Treatise on Real Actions, vol. 1, p. 206, says, that "the reason given against such a plea is, that the tenant may tender the demi-mark, and have the ancestor's seisin inquired into." This reason for the doubt is not stated by Judge Jackson, in his Treatise on Real Actions, p. 285; and, upon the authorities, the doubt does not seem to rest on any reasonable and substantial ground. In the writ of *mort d'ancestor*, informed on in the descender, in *nuper obiit*, and in a writ of cosinage, as well as in a writ of entry, it is a good plea that the demandant himself was seised after the death of the ancestor: Roscoe, *ubi sup.* And we think, notwithstanding the doubts suggested, that it is a good plea or defense in a writ of right. The tenant, however, has failed to make out any such defense. There is no evidence that the demandant ever entered

the premises after the death of his father, and became actually seised of his share therein; and before the revised statutes, he could not maintain an action, counting on his own seisin. In a writ of entry, or a writ of right, the demandant must count on an actual seisin, and a seisin in law is insufficient. Before entry by the heir, after the death of the ancestor, or an equivalent act, he can not maintain an action of trespass, or a writ of entry on his own seisin, unless the land be vacant and unoccupied: *Plowd.* 142;¹ 2 *Rol. Abr.* 553; *Wells v. Prince*, 4 *Mass.* 67; *Dally v. King*, 1 *H. B.* 1; *Bac. Abr.*, Trespass, E. 3.

The law in relation to the question under consideration, is correctly stated in 2 *Preston's Abstracts*, 345: "The writ of entry sur abatement," he says, "must necessarily be grounded on the seisin of the ancestor; and therefore fifty years is the limitation within which a writ of entry sur abatement must be brought. It does not seem to have ever been supposed that the disseisin was to the heir, so as to bar him, unless he should bring his action within thirty years." Nor can it be maintained, as a ground of defense, that by the entry of Ebenezer Hunt, after the death of his father, all the heirs became actually seised; because, unless his entry was adverse to the claims of the other heirs, there is no evidence of a disseisin; and on that ground the defense fails.

The remaining ground of defense in support of the tenant's title, and that on which his counsel seem principally to rely, is the presumption arising from the long possession of Ebenezer Hunt, that the premises were conveyed to him by his father, or that the other children and heirs have relinquished their shares therein to him, since the death of their father. As to the presumption of a deed from the father, we think there is clearly no ground on which it can be maintained. Nor was it much relied on at the argument. The father had not the mental capacity to make a legal conveyance of his property, or any other binding contract; and the occupation of Ebenezer with his father, is no ground for the presumption of a conveyance from him, had he been of a capacity to make a legal conveyance. Ebenezer, for a number of years before his father's death, had the principal but not the sole management of the farm, as the demandant had, before the return of Ebenezer from Ackworth; but the father and the mother assisted. This joint or mixed possession and occupation is certainly no foundation for the presumption of a grant.

1. *Browning v. Boston.*

The question then is reduced to this, namely, whether the possession of Ebenezer, after the death of his father, is a sufficient foundation for the presumption of a grant or release from the other children. It must be admitted that there is no legal or artificial presumption of any such grant. "In general," as remarked by Story, J., in *Ricard v. Williams*, 7 Wheat. 110, "it is the policy of courts of law, to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes ordinarily a sufficient title or defense." So Lord Mansfield says, in *Eldridge v. Knott*, Cowp. 216, "there is no instance of setting up any length of time within the limitation fixed by the statute, as a bar to the demand." And so Aston, J., remarked, in the same case, that mere length of time unaccompanied with other circumstances ought not to alter the limitation fixed by the statute and set up another. If the law were otherwise, it would effectually alter and do away with the intended operation of the statute of limitations. That impliedly declares, that in a writ of right no disseisin or adverse possession shall be a bar unless it continues for forty years.

Now in the present case there are no circumstances superadded to the adverse possession of Ebenezer Hunt—if his possession were adverse—leading to the conviction or belief that he ever had a grant from the other children and heirs. On the contrary, the circumstances, which were proved, rather tend to weaken the presumption of any such grant. There would have been more reason for the presumption, if the occupation had been by a stranger. Ebenezer had a right to continue his occupation as one of the heirs; and there is no clear proof that his occupation was intended to be adverse to the claims of the other heirs. He had made considerable advances during the life of his father, in repairing the house, building a barn, and for other expenses, for which he expected, probably, to be reimbursed from the profits of the farm. To this the other heirs could not reasonably object. And this may account for their forbearance to claim any share of the profits. Another circumstance, suggested by the demandant's counsel, might have some influence to prevent them from interposing any such claim. It appeared that Ebenezer had acquired a large estate, which his brothers and his sister might reasonably expect to inherit; and if so, they might have been unwilling to advance claims that perhaps might give offense. But whether these suppositions are probable or not, we think

there is no evidence to warrant the inference, that a conveyance to Ebenezer from the other heirs has ever been made. The probability of such an act is not sufficient. The evidence to support a natural presumption of a fact must be such as to lead the mind to a conscientious belief of its existence, beyond a reasonable doubt. This the evidence in the present case fails to do; and, as it seems to us, it fails to establish a reasonable probability of any such conveyance as is set up by the tenant to defeat the demandant's right. That right is not barred by the statute of limitations, and ought not, therefore, to be defeated by any presumption or inference not supported by convincing and satisfactory evidence.

Judgment on the verdict.

Cited in *Peele v. Chever*, 8 Allen, 92, to the point that a tenant in a writ of entry can not set up an outstanding title in a stranger, except for the mere purpose of rebutting the demandant's evidence of seisin.

SAMSON v. THORNTON.

[3 METCALF, 275.]

ORIGINAL PROMISOR, WHEN INDORSER IS CONSIDERED AN.—Where the payee of a promissory note has taken it and carried it away, but, on the same or the next day, returns it to the maker with a request to have him procure an indorser thereon, which the maker does, the indorser so obtained will be considered an original promisor, and as such jointly and severally liable with the maker.

EXECUTION OF DEED AND DELIVERY THEREOF TO REGISTER for the purpose of registration, without delivery to the grantee, vests no title in him, and nothing passes thereby.

ASSUMPSIT, in which the declaration charged the defendant as an original promisor. The note was signed by Benjamin Russell and indorsed by the defendant. *Plea non assumpsit*. The other facts are sufficiently stated in the opinion.

Colby and Clifford, for the defendant.

Coffin and Eliot, for the plaintiff.

By Court, SHAW, C. J. Assumpsit on a promissory note, against the defendant as indorser, who, not being the payee of the note, if liable at all, must be held to stand in the character of an original joint promisor and surety: *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68]; S. C., 6 Id. 519. Many cases have since been decided upon the same principle. But to charge an indorser on this ground, it must appear that he was an original

promisor and undertaker with the principal. If after a note is delivered, and the contract complete, a person intending to add to the strength of the note by pledging his own credit, should indorse it, this would be a guaranty, a distinct and collateral contract, and would require a new consideration to support it. Whereas, an original promisor and surety is deemed in law to participate in the original consideration, and to be bound jointly with the principal. This distinction is perfectly well established in this commonwealth, by the decisions which were cited by the defendant's counsel. The only question, therefore, on this part of the case, is, whether the defendant was such original promisor, or whether he became an indorser afterwards, so that, if bound at all, he was bound only as a guarantor. It appears that Russell was indebted to the plaintiff in the sum of one thousand six hundred dollars or one thousand seven hundred dollars, being the amount due to the plaintiff, as master of a vessel, on settlement of a whaling voyage. The plaintiff received one note for six hundred dollars at sixty days, which he got discounted at a bank, and it was paid at maturity by the promisor. For the balance, the note in question was given, payable on demand with interest. Russell made out the plaintiff's account; and signed the note in question for the balance; he then handed them to Samson, and he took them away. It is stated by the witness, that at that time he manifested no dissatisfaction; but it is not stated that he agreed to accept the note without other security. If he took these papers, not as upon a final and concluded settlement, but for a general purpose, as for inquiry and examination, then he would not be bound by the mere act of receiving them; and that he did thus take them provisionally is to be inferred from the fact that he soon came back, and expressed his wish to have a surety. And that it was so understood by Russell may fairly be inferred from the readiness with which he received back the note to obtain an indorser. In this respect, the case differs from the late case of *Ilsley v. Jewett*, 2 Metc. 168, where the note had been delivered and accepted, and where the maker got it back into his possession, for a special purpose, and then refused to redeliver it. It was held to be a good and complete contract notwithstanding. It was delivered by one party and accepted by the other, and the promisee never consented to give it up.

But there is another view. Suppose when Samson brought the note back, and though delicately, yet actually, asked for a surety, Russell had said "no, the note has been accepted, and

the account is settled, and you are bound by it." Suppose he was right in that respect, and might have refused to take back the note; yet in fact he did not do so; but, on the contrary, acceded to the proposal, and took the note back. He had no motive to do otherwise, because the plaintiff held the note on demand, and had the same power to demand and compel payment or security for the note, which he would have had for the account, if it had not been settled by note. But we consider that by acceding to the plaintiff's request, and taking back the note, in order to furnish the plaintiff with a surety or indorser, the parties by mutual consent rescinded that contract, so far as to treat the negotiation as still open, and when the note was indorsed and redelivered, it was the original contract of both the promisor and indorser, made upon the same consideration; and that the defendant became liable, as such promisor and surety, without any new consideration.

But there was another ground of defense, namely, that the note had been paid and satisfied by the principal, by the conveyance of a lot of land. That there was an agreement for such a conveyance in satisfaction of the note seems to be established by proof; but the question is, whether it was in fact conveyed so as to operate as a satisfaction. Russell testified that he agreed to convey, and the plaintiff to purchase, a lot of land at thirty dollars a rod, which would considerably exceed the amount of the note, and that the note was to go in part pay.

It is necessary, for the purpose of deciding this question, to compare the dates. The deed bears date May 31, 1833. It was acknowledged December 26, 1833, and was recorded December 30, 1833. The plaintiff went on a voyage to sea August, 1833, and returned in February, 1836. The attachment of the land, by the Marine bank, as the property of Russell, was made on the twenty-sixth of January, 1835. The question is, whether the title was at that time vested in the plaintiff, so that he could resist that attachment and the levy of execution afterwards made in pursuance of it. It is very clear, that the deed was not delivered to the plaintiff before he went to sea, and that it was not completed. The witness gives as a reason for it, that the quantity of land had not been ascertained by admeasurement, and of course the amount of the purchase money was not ascertained. But it was not acknowledged till December, 1833, long after the plaintiff had gone, and it was then in the hands of the grantor. He then, having become embarrassed, acknowledged the deed without inserting the consideration, and sent it to the county regis-

try. This was the grantor's own act. A deed takes effect by delivery. An execution and registration of a deed, and a delivery of it to the register for that purpose, do not vest the title in the grantee. Nothing passes by it: *Maynard v. Maynard*, 10 Mass. 456 [6 Am. Dec. 146].

This is distinguishable from the case of *Hedge v. Drew*, 12 Pick. 141 [22 Am. Dec. 416], where the father proposed to the daughter to execute a deed to her, and to leave it with the register for her use, and she expressed her assent to, and satisfaction with, the arrangement. She thereby made the register her agent to receive the deed. Here was no agent to accept the deed, no delivery to give the deed effect as a conveyance, and no ratification until long after the attachment was made.

The fact that Russell entered the note as paid in his notebook proves nothing more than his opinion. He no doubt intended honestly to comply with his agreement, and convey the land, and did what he could do to accomplish it; and probably thought that he had legally done it. If he was right in this belief, the note was paid; he probably thought so, and entered it accordingly.

On the whole, the court are of opinion, that the defendant was an original promisor; that the note was not paid by a valid conveyance of the land, and that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

INDORSEMENT ON NOTE AT TIME OF EXECUTION, EFFECT OF: See *Bright v. Carpenter*, 34 Am. Dec. 432, note 433; also note to *Perkins v. Catlin*, 29 Id. 297, where this subject is discussed fully. See also *Richardson v. Lincoln*, 5 Metc. 203; *Union Bank of Weymouth v. Willis*, 8 Id. 509; *Bryant v. Eastman*, 7 Cush. 113; and *Wright v. Morse*, 9 Gray, 338, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Howe v. Merrill*, 5 Cush. 83, to the point that where a defendant's name is not put on a note until after its negotiation to a creditor, the defendant could in no sense be regarded as an original party; and in *Essex Co. v. Edmonds*, 12 Gray, 278, to the point that some parol evidence is admissible to show when the name was put on the note.

DEED EXECUTED AND PUT ON RECORD BY GRANTOR does not pass title without some further act of delivery and acceptance: See *Brabrook v. Boston F. C. S. Bank*, 104 Mass. 230; *Parmelee v. Simpson*, 5 Wall. 86, both citing the principal case.

MERE RECORDING OF DEED DOES NOT OPERATE AS DELIVERY: See *Hawkes v. Pike*, 105 Mass. 563, citing the principal case; *Chess v. Chess*, 21 Am. Dec. 350, note 361.

COMMONWEALTH v. LOUD.

[3 METCALF, 328.]

CONVICTION BEFORE JUSTICE OF PEACE, AND PERFORMANCE OF SENTENCE IMPOSED, constitute a bar to an indictment for the same offense, although the judgment upon which the sentence was rendered was so defective that it would have been reversed on error.

INDICTMENT for larceny. The opinion states the case.

Hallett and Kingsbury, for the defendant.

Austin, attorney-general, for the commonwealth.

By Court, PUTNAM, J. This case comes before us on exceptions to the ruling of the court of common pleas, and we decide it on the last which appears to be made, namely, that the defendant offered to prove the record and proceedings of a prior conviction for the same offense, before a justice of the peace, as a bar, but that the court ruled that the same did not constitute a bar to this prosecution. And the attorney-general admits that this case is to be taken and considered by the court, as if that plea had been formally made with proper averments; that the larceny of which the defendant was convicted was of the same property, for the stealing of which he has been again indicted and convicted; and that the defendant submitted to the former judgment, and performed the sentence. But it is contended for the commonwealth, that the supposed former conviction was not only erroneous, but was merely void. In the case of *Commonwealth v. Phillips*, 16 Pick. 211, it was held, that a conviction, on a complaint in similar form to that which was used in the case at bar, was erroneous; and the judgment was arrested. The defendant excepted to that judgment, as he well might. But in the case at bar, the defendant waived any exception to the judgment, complaint, proceedings, or sentence; and he has performed the sentence.

The commonwealth now desire to have those proceedings held for nothing, so that, by an indictment in technical and legal form, the defendant may be again tried and punished for the same offense of which he has been informally convicted. We can not think that those proceedings before the magistrate were merely void. On the contrary, it is reasonable to believe, that the complainant intended to prosecute for a larceny. The defendant understood it so, and so did the magistrate. Now the judgment that the defendant was guilty, although upon proceedings which were erroneous, is good until the same be

reversed. This rule of criminal law is well settled. It was the right and privilege of the defendant to bring a writ of error, and reverse that judgment; which writ would have been sustained by the case before cited of *Commonwealth v. Phillips*; but he might well waive the error and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offense: *Vaux's case*, 4 Co. 45; 2 Hale P. C. 251; 2 Hawk, c. 36, sec. 10 *et seq.*; 1 Stark. Crim. Pl. (2d ed.) 329, 330.

The evidence which was offered, we think, constituted a good defense to the indictment. The bill of exceptions is sustained. Therefore the verdict should be set aside, and the defendant should go thereof discharged, without day.

Cited in *Commonwealth v. Keith*, 8 Metc. 532, to the point that where a defendant submitted to an erroneous conviction and suffered the punishment, the judgment under which the penalty was inflicted will not be treated as a nullity, but will stand good till reversed; and in *Wood v. Southwick*, 97 Mass. 356, to the point that a complaint or an indictment may set forth an offense sufficiently to make a conviction or acquittal a bar to a second trial of the defendant for the same acts, although it would be adjudged bad on motion to quash or on demurrer.

ORIENTAL BANK v. HASKINS.

[3 METCALF, 332.]

SECONDARY EVIDENCE MAY BE GIVEN, OF CONTENTS OF PAPER which has been superseded by execution of a new agreement between the parties thereto, touching the same subject-matter, where the party to whom it was surrendered makes affidavit that he has made diligent search for it, but can not find it, and that he supposes it to have been destroyed.

SECRET TRUST INCONSISTENT WITH TERMS OF SALE OF PROPERTY, though evidence of fraud, if not satisfactorily accounted for, is not fraud *per se*, nor conclusive evidence of it. And there is no distinction, in this respect, between conveyances of real and of personal estate.

CONVEYANCE FRAUDULENT AS AGAINST CREDITORS or against subsequent purchasers is voidable only, not absolutely void, and may be purged of the fraud by matter *ex post facto*, whereby the fraudulent intent is abandoned, and the conveyance confirmed for a good and adequate consideration *bona fide*.

WRIT of entry. The demandants claimed under a levy of an execution against John Haskins, and the tenant claimed under a deed from the same person. The demandants attempted to impeach this deed as fraudulent against creditors. The jury found for the tenant. The other facts sufficiently appear from the opinion.

B. R. Curtis and Clarke, for the demandants.

Choate, for the tenant.

By Court, WILDE, J. Several exceptions have been taken to the ruling of the court at the trial, as to the admission of evidence, and to the instructions given to the jury. These exceptions have been taken into consideration by the court, after hearing the arguments of counsel, and the opinion we have formed thereon I will now briefly state.

The tenant was permitted to prove by parol the contents of a certain paper, being a written agreement whereby he had agreed to reconvey the demanded premises to the witness, on a certain contingency. It was testified by the witness, that this paper had been given up by him to the tenant, after they had made a new agreement by which the witness relinquished all claim, under said written agreement, for a reconveyance. And the tenant thereupon made affidavit, that he had made diligent search for said paper and could not find it, and that he supposed it was destroyed. This evidence was decided to be sufficient to prove the loss or destruction of the written agreement, so as to admit secondary evidence of its contents; and we are clearly of opinion, that it was rightly so decided. As between the parties, the paper had become of no importance, by reason of the new agreement; and the destruction of it, if it was destroyed, would furnish no proof nor create any suspicion of a fraudulent design in its destruction. If it had continued a subsisting security, and had been voluntarily destroyed, it might have admitted a different inference, and the case of *Blade v. Noland*, 12 Wend. 173 [27 Am. Dec. 126], might perhaps have been applicable. But the primary evidence in this case repels the inference there made, and proves, as satisfactorily as the nature of the case admits, that the paper had been lost or destroyed; and in either case, the secondary evidence was admissible.

The next question to be determined is, whether there are any legal exceptions to the instructions given to the jury. It is objected in the first place, that the evidence disclosed a secret trust in the conveyance from John Haskins to the tenant, which rendered it fraudulent against creditors, and that the evidence of the fraudulent intent was conclusive. That this is not the law in respect to the sale and conveyance of personal property is unquestionable. A secret trust inconsistent with the terms of a sale of property is evidence of fraud, if not satisfactorily accounted for; but it is not fraud *per se*, nor conclusive evidence

of fraud. But it is contended, that there is a distinction between the conveyance of real and personal estate; and there are *dicta* in support of such a distinction. But they do not seem to us to be well founded on principle or authority. The decision in the case of *Cutler v. Dickinson*, 8 Pick. 386, is expressly to the contrary. In that case, it was decided that an absolute conveyance of land, the grantor taking back a writing not under seal, for a reconveyance on a condition, was not *per se* fraudulent as against creditors. That was a case in all respects similar to the present, so far as it relates to the question under consideration, and is decisive. A question somewhat similar has been much discussed, and upon which there are conflicting decisions. It was laid down by Buller, J., in *Edwards v. Harben*, 2 T. R. 596, as a general rule, that in the transfer of goods and chattels, the possession must accompany and follow the deed, and that an absolute conveyance without possession, was in point of law fraudulent, and not merely evidence of fraud. That this was not considered to be the law in ancient times appears very clearly by *Twyne's case*, 3 Co. 80. It was in that case held, that a secret trust, and the possession of the goods sold by the vendor after the sale, were only badges of fraud and were not fraudulent *per se*. And so it was considered in several subsequent cases. And so, I think, the law is now held in England, notwithstanding the case of *Edwards v. Harben*, and some other cases. In this commonwealth, it has been uniformly held that a sale of goods may be valid, although the possession does not accompany and follow the conveyance; that the subsequent possession by the vendor is evidence of a secret trust and collusion between the parties, to be submitted to a jury; but that it is not conclusive evidence of fraud: 15 Mass. 247;¹ 16 Id. 279;² 1 Pick. 295,³ 399;⁴ 2 Metc. 263.⁵ See also Cowp. 432;⁶ 2 Bulst. 226;⁷ 2 Bos. & Pul. 60;⁸ Ry. & Moo. 312;⁹ 4 Barn. & Cres. 654;¹⁰ 1 Mau. & Sel. 254;¹¹ 4 Taunt. 823;¹² 8 Id. 838;¹³ 3 Barn. & Adol. 498;¹⁴ 7 Wend. 438;¹⁵ 3 Cow. 166;¹⁶ 8 Id. 453;¹⁷ 3 Yerg. 475,¹⁸ 502.¹⁹

Another objection to the instructions to the jury is much relied on by the counsel for the demandants, in regard to which there

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| 1. <i>Brooks v. Powers</i> ; S. O., 8 Am. Dec. 99. | 11. <i>Leonard v. Baker</i> . |
| 2. <i>New England M. Ins. Co. v. Chandler</i> . | 12. <i>Watkins v. Birch</i> . |
| 3. <i>Bartlett v. Williams</i> . | 13. <i>Joseph v. Ingram</i> . |
| 4. <i>Badlam v. Tucker</i> ; S. O., 11 Am. Dec. 202. | 14. <i>Martindale v. Booth</i> . |
| 5. <i>Briggs v. Parkman</i> . | 15. <i>Jackson v. Timmerman</i> . |
| 6. <i>Cadogan v. Kennett</i> . | 16. <i>Bissell v. Hopkins</i> ; S. O., 15 Am. Dec. 290. |
| 7. <i>Stone v. Grubham</i> . | 17. <i>Seward v. Jackson</i> . |
| 8. <i>Kidd v. Rawlinson</i> . | 18. <i>Callen v. Thompson</i> ; S. O., 24 Am. Dec. 507. |
| 9. <i>Eastwood v. Brown</i> . | 19. <i>Darwin v. Handley</i> . |
| 10. <i>Latimer v. Batson</i> . | |

are several conflicting decisions in which the question has been very fully discussed. The objection is to that part of the charge in which the jury were instructed, that although they might be of opinion that the conveyance to the tenant was originally fraudulent as against creditors, yet if they should be of opinion, that there was no fraudulent intent in the subsequent settlement and adjustment of the concerns between the parties, and that there was no intention to delay or defraud creditors, and that the transaction was *bona fide* and fair, then that the transaction would purge any supposed fraud in the deed. It is objected that the original conveyance to the tenant was absolutely void as against creditors, and not merely voidable by them, so that no subsequent transaction could purge the fraud.

This objection is sustained by the cases of *Preston v. Crofut*, 1 Conn. 527, note, and *Merrill v. Meachum*, 5 Day, 341. In the latter case it was decided that a deed made with an intent to defraud creditors was absolutely void, and that no subsequent act of the parties could render the deed valid against creditors. In that case, the deed was not delivered to the grantee when it was made; but when it was made known to him, he assented to it, and paid an adequate consideration for a part of the land, and reconveyed the residue to the first grantor. The case was decided upon a supposed distinction between the effects on a conveyance, by stat. 13 Eliz., c. 5, and stat. 27 Eliz., c. 4. Two of the judges, Smith and Ingersoll, dissented from the opinion of the majority of the judges, and for reasons, as it seems to us, very forcible and convincing. The distinction, however, on which these cases were decided, was maintained by Chancellor Kent, in *Roberts v. Anderson*, 3 Johns. Ch. 371. The question was afterwards very fully discussed by Story, J., in *Bean v. Smith*, 2 Mason, 252, and he fully concurred in the opinion expressed by the dissenting judges in Connecticut. He considered the distinction, on which those cases in Connecticut were decided, as entirely novel and unsupported by any previously adjudged case, or by any sufficient reason. And the same opinion was expressed by Parker, C. J., in *Somes v. Brewer*, 2 Pick. 198 [13 Am. Dec. 406]: "Great weight," he said, "should be attached to the opinion of such men as composed that court, and the more, as their opinion is unequivocally approved of and sanctioned by Mr. Chancellor Kent. Still as their decision runs counter to all our practical notions, and to many judicial decisions in this state; as it was combatted with great force by a very eminent member of the Connecticut bench; and as the decree of

the chancellor of New York was reversed in the court of errors, conformably to the opinion of the common law judges of that state; we can not think it will be adopted beyond the jurisdiction of Connecticut." See also 4 Kent's Com., 3d ed., 464, and note.

We entirely concur in the opinions expressed by Chief Justice Parker and Mr. Justice Story, and for the reasons by them assigned in the discussion of the question. We think there is no such distinction between the 13 and 27 of Eliz., as was maintained by the majority of the court in Connecticut, but that conveyances, fraudulent as against creditors or against subsequent purchasers, are voidable only, and not absolutely void; and that if the fraudulent grantee conveys the estate to a *bona fide* purchaser for a valuable consideration, the conveyance is good, and the first grant will be purged of the fraud. And so we hold that such a fraudulent grant may be purged of the fraud by matter *ex post facto*, whereby the fraudulent intent is abandoned, and the grant confirmed for a good and adequate consideration *bona fide*: Comb. 222,¹ 249;² 1 Sid. 133;³ 1 New Rep. 332;⁴ 10 Johns. 185;⁵ 12 Id. 552;⁶ 14 Id. 407;⁷ 1 Johns. Ch. 271.⁸ And so it was held in *Thomas v. Goodwin*, 12 Mass. 140. In that case, one who was summoned as trustee had received goods under circumstances indicative of fraud, and which would have fixed him as trustee; but before the service of process upon him, he had paid debts of the principal to the amount of the goods received, and he was discharged. And a similar decision was made in *Hutchins v. Sprague*, 4 N. H. 469 [17 Am. Dec. 439].

These decisions are in accordance with the instructions to the jury in the present case, and we are of opinion that the exceptions taken can not be maintained. Whether the jury found there was any fraud in the original conveyance does not appear. But if they did, we think it was competent for them to return a verdict for the tenant, if they believed from the evidence that the fraud was purged by a *bona fide* settlement, and a full payment for the land, before the plaintiffs' attachment.

Judgment on the verdict.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONTENTS OF LOST WRITING: See *Pruden v. Alden*, 34 Am. Dec. 51, note 53, where other cases in this series are collected. In *Stone v. Sanborn*, 104 Mass. 325, the principal case is cited to the point that a party who willfully destroys a document will not

1. *Porter v. Clinton*.

2. *Smart v. Williams*.

3. *Prodgers v. Langham*.

4. *Dee v. Martyr*, 1 Bos. & P. N. B. 332.

5. *Jackson v. Henry*; S. C., 6 Am. Dec. 328.

6. *Verplank v. Sterry*; S. C., 7 Am. Dec. 342.

7. *Jackson v. Walsh*.

8. *Sterry v. Arden*.

be permitted to testify as to its contents, until he has introduced evidence to rebut the inference of fraud arising from his act. But in *Smith v. Holyoke*, 112 Id. 521, citing the principal case, it was decided that where the trial judge found that the papers were not fraudulently destroyed, the supreme court would not interfere with that finding.

CONVEYANCE PURPORTING TO BE ABSOLUTE, but, in fact, accompanied by a secret trust, was held fraudulent and void as to creditors in *McCulloch v. Hutchinson*, 32 Am. Dec. 776. See also *Birely v. Staley*, 25 Id. 303.

RETENTION OF POSSESSION BY VENDOR ON SALE OF CHATTELS, EFFECT OF: See *Mason v. Bond*, 33 Am. Dec. 243; *Eagle v. Eichelberger*, 31 Id. 449, and note 450, where cases on this subject are collected, and the rule on this point in different states is stated: *Moore v. Kelley*, 26 Id. 283, note 284; *Coburn v. Pickering*, 14 Id. 375, note 383.

BONA FIDA PURCHASER FROM FRAUDULENT GRANTEE GETS GOOD TITLE: See *Hood v. Fahnestock*, 34 Am. Dec. 489, note 492; *Price v. Junkin*, 28 Id. 685, note 688, where other cases are collected; also *Green v. Tanner*, 8 Metc. 422, and *Choteau v. Jones*, 11 Ill. 322, both citing the principal case.

CONVEYANCES FRAUDULENT AS TO CREDITORS ARE NOT PER SE FRAUDULENT AND VOID: *Murphy v. Marland*, 8 Cush. 577, citing the principal case. See also note to *Eagle v. Eichelberger*, 31 Am. Dec. 450. In *Lynde v. McGregor*, 13 Allen, 181, the principal case is cited as authority for the position that if any part of the original purpose is fraudulent the whole may be avoided, and if part is fraudulent it vitiates the whole. And in *Crowninshield v. Kittridge*, 7 Metc. 524, and in *Harvey v. Varney*, 98 Mass. 120, it is cited to the point that a conveyance fraudulent as to creditors in its inception may be purged of the fraud by matter *ex post facto*.

WENTWORTH v. DAY

[8 METCALF, 352.]

FINDER OF LOST PROPERTY HAS A LIEN THEREON for the amount of the reward offered by the loser for its restoration, and he may retain possession thereof until the reward is paid.

TROVER for a watch. The facts appear from the opinion.

E. Ames, for the plaintiff.

Homer, for the defendant.

By Court, SHAW, C. J. Although the finder of lost property on land has no right of salvage, at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it, as

to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done: *Symmes v. Frazier*, 6 Mass. 344 [4 Am. Dec. 142]. But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor: *Green v. Farmer*, 4 Bur. 2221. In *Kirkman v. Shawcross*, 6 T. R. 14, it was held, that where certain dyers gave general notice to their customers, that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers, after notice of such terms, must be taken to have assented to them, and thereby the goods became charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale, the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it, till the price is paid. Nor is the purchaser bound to pay, till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption, that it was not the intention of the vendor to part with his goods, till the price should be paid, nor that of the purchaser to part with his money, till he should receive the goods. But this presumption may be controlled, by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was, that whoever should return his watch to the printing office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication is that the acts of performance were to be

mutual and simultaneous: the one to give up the watch, on payment of the reward; the other to pay the reward, on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the reward, in behalf of himself and his son, and was not bound to surrender the actual possession of it, till the reward was paid; and therefore a refusal to deliver it, without such payment, was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time, after the watch should have been restored, or in any other manner inconsistent with a lien for the reward, on the article restored, in which case, no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider, whether such an offer would be equally efficacious in bringing back his lost property, as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him, he made an offer, to pay the reward on the restoration of the watch; and his subsequent attempt to get the watch, without performing his promise, is equally inconsistent with the rules of law and the dictates of justice.

The circumstance, in this case, that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit were brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it to the owner, without payment of the reward, was no conversion.

Judgment for the defendant.

FINDER OF LOST PROPERTY ENTITLED TO REWARD: See *Deslondes v. Wilson*, 25 Am. Dec. 187, note 189, where the subject is fully discussed; also *Loring v. Boston*, 7 Metc. 411, and *Ryer v. Stockwell*, 14 Cal. 137, both citing the principal case.

FINDER HAS LIEN TO EXTENT OF OFFER: See note to *Deslondes v. Wilson*, 25 Am. Dec. 189; *Preston v. Neale*, 12 Gray, 223; *Vail v. Durant*, 7 Allen, 409.

THE PRINCIPAL CASE IS DISTINGUISHED in *Kincaid v. Easton*, 98 Mass. 141.

NELSON v. BOYNTON.

[3 METCALF, 396.]

PROMISE OF SON TO PAY NOTE OF HIS FATHER, in case the promisee should discontinue an action commenced on such note, is within the statute of frauds, and invalid unless it is in writing.

TO PROVE THAT ATTACHMENT WAS MADE ON WRIT WHICH IS LOST, a person who saw the officer sign his return thereon is a competent witness, and it is not necessary that the officer himself should be called, although he is within the process of the court.

ASSUMPSIT on two promissory notes given by the father of the defendant to the plaintiff. At the trial J. Russell was called to prove that the real estate of the elder Boynton was attached in the former suit of the plaintiff against him, and testified that the writ in that suit was lost; that he wrote the return upon it, which was signed by one Savory, a deputy sheriff. The defendant objected, on the ground that Savory was within the process of the court, and was, therefore, the proper person to prove said attachment. The judge overruled this objection. The other facts sufficiently appear from the opinion.

O. P. Lord, for the defendant.

Hills, for the plaintiff.

By Court, **SHAW, C. J.** Questions depending upon this branch of the statute of frauds are often attended with some perplexity, on account of the difficulty in laying down a general rule, by which to distinguish a guaranty, or mere collateral promise for the debt of another, from an original agreement, upon a new and independent consideration, when the subject of the contract is the debt or default of another. Our own statute is in terms so nearly like the statute 22 Car. II., to prevent frauds and perjuries, that the English authorities upon its construction are entitled to the same consideration, as upon questions of common law. The statute, in force when the promise in question was alleged to have been made, was this: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or misdoings of another person, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized:" Stat. 1788, c. 16, sec. 1. The provision in the revised statutes is in nearly the same terms, and of the same legal effect: R. S. 74, sec. 1.

The object of the statute manifestly, was to secure the highest and most satisfactory species of evidence, in a case, where a party without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation, on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor, a father, son, or brother, by means of false evidence; by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence, into positive contracts. Some things under the statute seem to be well settled; and one is, that to bind one person for the debt or default of another, there must not only be a promise or memorandum in writing, but such promise must be made on good consideration. The statute does not vary the rule of common law, as to what constitutes a valid and binding promise; to every such promise, whether oral or written, there must be a good consideration. A promise without consideration is bad by the common law, as *nudum pactum*; a promise on good consideration, without writing, if for the debt of another, is bad by the statute. To bind one therefore, for the debt or default of another, both must concur: first, a promise on good consideration, and secondly, evidence thereof in writing. It is not enough, therefore, that a sufficient legal consideration for a promise is proved, if the object of the promise is the payment of the debt of another, for his account, and not with a view to any benefit to the promisor. Some expressions of a contrary opinion are to be found in *Perley v. Spring*, 12 Mass. 299; but they seem not to have been called for by the case, which was, no doubt, rightly decided on the facts disclosed.

The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own. The former, whether made before, or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object, on the part of the promisor.

In case one says to another, "deliver goods to A., and I will

pay you," it is binding, though by parol, because A., though he receives the goods, is never liable to pay for them. But if, in this same case, he says, "I will see you paid," or "I will pay, if he does not," or uses words equivalent, showing that the debt is in the first instance the debt of A., the undertaking is collateral and not valid, unless in writing: *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120. In these cases, the same consideration, which is the consideration of the promise of the principal, is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal, as the collateral promise of the surety, and is a good consideration for both: *D'Wolf v. Rabaud*, 1 Pet. 500; *Townsley v. Sumrall*, 2 Id. 182. The distinction between the different classes of cases is well stated in *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317]; and *Farley v. Cleveland*, 4 Cow. 432 [15 Am. Dec. 387].

The statute of frauds, says Mr. Justice Bayley in *Edwards v. Kelly*, 6 Man. & Sel. 209, was aimed at cases, where a debt being due from one person, another engaged to pay it for him; but where one promised to pay the debt of another, in order to release property in which he or his employers had an interest—as to extricate property subject to distress, on promising to pay the amount due—it was neither within the letter nor the mischief of the act.

But it has been argued that this case is not within the statute, because the consideration of the defendant's promise was the discontinuance of an action commenced by the plaintiff against the defendant's father, in which he had an attachment on real estate; and this, it was argued, brings it within the case of *Williams v. Leper*, 3 Burr. 1886, and that class of cases, in which the creditor had a claim or lien upon property, which was discharged, at the request and for the benefit of the party promising. That is the class of cases, where, as expressed in *Roberts on Frauds*, 232, the statute does not apply, if the consideration "spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself." In the latter, there is no doubt that a good promise may be made by parol, and it is independent of the statute.

In *Williams v. Leper*, 3 Burr. 1886, the landlord was about distraining for rent, and the defendant, a broker, who was employed to sell the goods, promised to pay the rent if the plaintiff

iff would forbear to distrain. It was put upon the ground that the direct object and purpose of this promise were, not to pay the debt of another, but that it was in effect a release and transfer of the plaintiff's interest in the goods, and that the leading object of the promisor was to obtain this transfer, and that the discharge of the rent was collateral and subsidiary.

The case of *Castling v. Aubert*, 2 East, 325, throws much light on this distinction. The plaintiff had a lien, as broker, on policies of insurance, sufficient to indemnify him against his liabilities for his principal, and the defendant had an interest in having them transferred to him; and, to induce the plaintiff to do so, promised to pay the debt of the principal. It was held that this was not within the statute. It was considered that though the discharge of the principal would eventually follow, yet because it was not the leading object of the transaction, but another and quite a different object, viz., that of obtaining the policies, it was not within the statute. It was in the nature of a purchase of the securities, which the plaintiff held and had a right to hold. So in the case of *Barrell v. Trussell*, 4 Taunt. 117.

The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute. In the case of *Fish v. Hutchinson*, 2 Wils. 94, the plaintiff had sued a third person, and the defendant, in consideration that he would stay his action, promised to pay; the original debt still subsisting. It was held that it was a promise for the debt of another, and within the statute. So in *Jackson v. Rayner*, 12 Johns. 291, where the plaintiff had sued the defendant's son, although the defendant stated, at the same time, that he had taken the son's property, and meant to pay his debts; it was held not binding without a promise in writing. Many other cases upon the construction of the statute might be cited to illustrate this distinction.

It becomes necessary then to apply the rule, thus established, to the circumstances of the present case. It appears that in the year 1834, the plaintiff commenced an action against the defendant's father, on two promissory notes, and attached real estate as security; that before the action was entered in court, the defendant promised the plaintiff, that if he would discontinue his

suit, he would pay him the amount of the notes, and that the suit was accordingly discontinued. It further appears that the notes were not given up, nor the father discharged. They were in fact the same notes, on which the action is now brought.

Under these circumstances, the court are of opinion that the promise was within the statute of frauds; a promise to pay the debt of the father; and therefore, though made on good consideration, was not valid, without a promise or memorandum of the agreement in writing. For, although the effect of the discontinuance of the action was to discharge the attachment, yet that was incidental only, and the leading object and purpose were the relief and benefit of the father, and not of the son. It does not appear that the son had any interest in the estate released, or object or purpose of his own to subserve. It is the ordinary case of a son becoming surety for the father's debt, in consideration of surceasing a suit, or other forbearance, and therefore, not being in writing, is within the statute. And although the forbearance would be a good consideration for such a promise, if proved by written evidence, yet the consideration was not of such a character as to constitute a new and original transaction between these parties.

The court below, having expressed a different opinion, and instructed the jury that this bargain, if they found it had been so made, was an original undertaking by the defendant, for a new consideration, and was not therefore within the statute of frauds, and also that, notwithstanding the notes were not given up, nor the father discharged, still, if there was a consideration for the promise, that the promise need not be in writing; this court are of opinion, that the verdict rendered for the plaintiff, in pursuance of these instructions, must be set aside, and a new trial granted.

It appears by the dates of the notes, that nearly six years had elapsed, when the former action was brought against the father on the notes, whether six years had elapsed from the times at which the causes of action on them respectively accrued, when the suit was discontinued, whether they were attested notes, or whether any new promise had been made, to take them out of the operation of the statute of limitations, does not appear. If at the time of that discontinuance the statute of limitations had actually taken effect, so that the discontinuance of the action was, in effect, a discharge of the debt, by a discharge of all remedy to recover it, so that the promise of the son may be considered as having procured the discharge of the debt due from the

father, it might present a different question, on which we are not called, by the present state of facts, to give an opinion. The instructions to the jury were not given with reference to any such case: See 9 Vt. 136.¹

An exception was taken to the admission of the testimony of Russell, to prove the fact of an attachment in the former suit. The writ on file was undoubtedly the primary and proper evidence to prove the attachment. But in case of its loss, and upon satisfactory proof of that fact, we do not perceive why its existence and contents may not as well have been proved by that witness, as by the testimony of the officer who served and returned it. The testimony of Russell, in regard to that of the officer, can not be deemed secondary. It does not presuppose the existence of evidence of a higher nature, which must first be adduced. In regard to the writ itself, both are secondary; but after proof of its loss, the memory of any one who saw it, and can testify to its contents, is of as high a nature as that of another, offered to prove the same fact.

Verdict set aside, and a new trial granted.

PROMISE TO PAY DEBT OF ANOTHER IS NOT WITHIN THE STATUTE OF FRAUDS and need not be in writing, when the promise arises out of some new and original consideration of benefit or harm between the newly contracting parties: *Alger v. Scoville*, 1 Gray, 397; *Jepherson v. Hunt*, 2 Allen, 423; *Burr v. Wilcox*, 13 Id. 273; *Furbish v. Goodnow*, 98 Mass. 300; *Ames v. Foster*, 106 Id. 403; *Willis v. Brown*, 118 Id. 138; *Clifford v. Luhring*, 69 Ill. 402; *Piatt v. U. S.*, 22 Wall. 506; *Stewart v. Hinkley*, 1 Bond, 568, all citing the principal case. See also *Anderson v. Davis*, 31 Am. Dec. 612, note 614, where other cases are collected.

COLLATERAL PROMISE IS WITHIN STATUTE, and must be in writing: *Curtis v. Brown*, 5 Cush. 491; *Dowd v. Swett*, 120 Mass. 323; *Davis v. Caverly*, Id. 416; *Eddy v. Roberts*, 17 Ill. 507; *Hite v. Wells*, Id. 91, all citing the principal case; *Anderson v. Davis*, 31 Am. Dec. 612.

THE PRINCIPAL CASE IS CITED in *Stone v. Walker*, 13 Gray, 615, and in *Clay v. Walton*, 9 Cal. 334, as explaining clearly the distinction between "original" and "collateral;" and in *Brightman v. Hicks*, 108 Mass. 247, to the point that when property subject to a lien is transferred by the debtor to a third person, the latter is not liable to an action by the creditor unless he made a direct promise either to the debtor or to the creditor to pay them; and that such a promise to a creditor who neither gives up his claim against the original debtor, nor any lien upon the property, is a promise to answer for the debt of another and must be in writing within the statute of frauds.

1. *Anderson v. Davis*; S. C., 31 Am. Dec. 612.

FOSTER v. MANSFIELD.

[3 METCALF, 412.]

DEED OF LAND EXECUTED, ACKNOWLEDGED, AND DELIVERED TO THIRD PERSON to be by him delivered to the grantee after the grantor's death, when so delivered, takes effect as from the date of the first delivery, and divests the estate of the grantor as from that time.

PETITION for partition. The petitioners claimed to be seised, in right of the wife, as tenants in common with the respondent. The respondent claimed that he was sole seised. The female petitioner and the respondent were the only children and heirs of John Mansfield, deceased. The respondent was the grantee referred to in the opinion. The other facts sufficiently appear from the opinion.

N. J. Lord, for the petitioners.

Ward, for the respondent.

By Court, SHAW, C. J. Whether, when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words used and the purposes expressed than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed, until the second delivery; but when thus delivered, it will take effect by relation, from the first delivery. But this distinction is not now very material, because where the deed is delivered as an escrow, and afterwards, and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity: *Wheelwright v. Wheelwright*, 2 Mass. 454 [3 Am. Dec. 66]. The cases there cited fully justify this position; and the principal is recognized in *Hatch v. Hatch*, 9 Mass. 310 [6 Am. Dec. 67].

This principle governs the present case. Mansfield, the grantor, being seised of the land, executed and acknowledged

a deed, and delivered it to Dr. Shed, with a request that he would deliver it to the grantee, after his, the grantor's, decease; which he did. Then, by relation, the deed took effect, as at the time of the first delivery, and divested the estate of the grantor, as from that time.

It is immaterial to inquire, what would have been the effect, if the grantor had recovered from his sickness and taken back the deed. As the estate did not effectually pass till the second delivery, if that second delivery had been prevented, it would probably have been held that it was wholly inoperative. Nor is it material to inquire whether such deed would have been valid against creditors. Had the deed been executed in the most formal manner, and delivered to the son himself, in presence of witnesses, if made without valuable consideration, it could not avail against creditors.

Judgment on the verdict for the respondent.

DELIVERY OF DEED TO GRANTEE AFTER GRANTOR'S DEATH: See *Gilmore v. Whitesides*, 31 Am. Dec. 563, note 569; *Jones v. Jones*, 16 Id. 35, note 39, where the subject is fully discussed. The principal case is cited in *O'Kelly v. O'Kelly*, 8 Metc. 439, and in *Wallace v. Harris*, 32 Mich. 398, in support of the rule that a delivery to another to be delivered after the grantor's death is a good delivery, and relates back to the first delivery.

THE PRINCIPAL CASE IS CITED to the point that delivery to a third person for the use of the grantee, on a future event, is a good delivery presently, in the following cases: *Shaw v. Haywood*, 7 Cush. 175; *Timothy v. Wright*, 8 Gray, 527; *Mather v. Corliss*, 103 Mass. 571; *Regan v. Howe*, 121 Id. 426; and *Marsh v. Austin*, 1 Allen, 238, and in *Blanchard v. Blackstone*, 102 Mass., to the point that a delivery to an agent is as effectual, as into the hands of the grantee himself.

CUMMINGS v. ARNOLD.

[3 METCALF, 496.]

WRITTEN CONTRACT MAY BE ALTERED BY SUBSEQUENT PAROL AGREEMENT, where the alteration is made on a good consideration and before any breach of the contract. And, in an action for a breach of the written contract, such alteration may be proved, although the oral agreement be within the operation of the statute of frauds.

ASSUMPSIT. The opinion states the case.

B. Sumner, for the defendants.

Codman, for the plaintiffs.

By Court, WILDE, J. This case comes before us on exceptions to the rulings of the court at the trial, whereby the evi-

dence offered by the defendants was rejected, on the ground that the facts offered to be proved would not constitute a legal defense. The action is founded on a written contract, by which the defendants undertook to deliver to the plaintiffs, at a stipulated price, a certain quantity of cloths for printing, from time to time, between the twenty-sixth day of October, 1838, and the first of March following.

The defendants admit that the written contract was not performed by them according to the terms of it; and they rely on two oral agreements, made subsequently to the execution of the written contract, by the last of which it was agreed that the plaintiffs should pay cash for the goods to be sent to them by the defendants—they discounting five per cent. on the stipulated price, whenever the goods sent should amount to the value of one thousand dollars, not before paid for; that, under this last verbal agreement, the defendants delivered one hundred and fifty pieces of goods, and that the plaintiffs refused to perform said agreement on their part. The defendants also offered to prove that each of these verbal agreements was made on a legal and good consideration. The question is, whether these facts, if proved, would constitute a legal defense to the action. The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.

This rule is laid down by Lord Denman, in *Goss v. Lord Nugent*, 5 Barn. & Adol. 65, as a well-established principle, in these terms: “After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.”

The same principle, substantially, is maintained by numerous cases both in England and in this country: *Milton v. Edgworth*,

5 Bro P. C. (2d ed.) 313; Bull. N. P. 152; 1 Mod. 262;¹ 2 Id. 259;² 12 Id. 538;³ 3 T. R. 590;⁴ 1 East, 631;⁵ 12 Id. 578;⁶ 1 Esp. 54;⁷ 3 Stark. Ev. 1002; Chit. Con. (5th Am. ed.) 108; 14 Johns. 330;⁸ 9 Cow. 115;⁹ 1 Johns. Cas. 22;¹⁰ 3 Id. 60;¹¹ 3 Johns. 531;¹² 12 Wend. 446;¹³ 13 Id. 71;¹⁴ 9 Pick. 298;¹⁵ 13 Id. 446;¹⁶ 2 Watts, 456;¹⁷ 5 Cow. 497;¹⁸ 7 Id. 50;¹⁹ 3 Fairf. 441;²⁰ 4 N. H. 40;²¹ 6 Halst. 174;²² 1 A. K. Marsh. 582.²³

In *Dow v. Tuttle*, 4 Mass. 414 [3 Am. Dec. 226], it was decided that where the promisee of a note payable at a day certain contracts, at the time the note is given, not to demand payment of it, until a certain time after its maturity, such contract is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie; but that it is no bar to an action on the note, when due by the terms of it. But this case was decided on the ground that the agreement, offered to be proved in the defense, was made at the time of making the note, and was repugnant to the terms of it. This decision, therefore, is not inconsistent with the doctrine maintained in the cases cited.

But the plaintiffs' counsel contends, that however the general principle may be, as to the effect of a parol agreement on a previous written contract, it is not applicable to the present case, the parol agreement being void by the statute of frauds; and that to allow a parol agreement to be engrafted upon a written contract, would let in all the inconveniences which were intended to be obviated by the statute. In considering this objection, we have met with many conflicting decisions, but for which, we should have had but little difficulty in disposing of the question raised. And notwithstanding the doubts excited by some of these decisions, we have been brought to a conclusion which coincides, as we think, with the true meaning of the statute. The language of the fourth section (Rev. Stats., c. 74), on which the question depends, is peculiar. It does not require that the note or memorandum in writing of the bargain

1. *Edwards v. Weeks.*

2. *Edwards v. Weeks.*

3. *May v. King.*

4. *Little v. Holland.*

5. *Heard v. Wadham.*

6. *White v. Parlin.*

7. *Thresh v. Rake.*

8. *Lattimore v. Harson.*

9. *Bailey v. Johnson.*

10. *Keating v. Price*; S. C., 1 Am. Dec. 92.

11. *Ballard v. Walker.*

12. *Fleming v. Gilbert.*

13. *Bruster v. Courtymen.*

14. *Delacroix v. Bulkley.*

15. *Munroe v. Perkins*; S. C., 20 Am. Dec. 475.

16. *Richardson v. Hooper.*

17. *Vicary v. Moore.*

18. *Frost v. Everett.*

19. *Dearborn v. Cross.*

20. *Low v. Treadwell.*

21. *Robinson v. Batchelder.*

22. *Perrine v. Cheeseman*; S. C., 19 Am. Dec. 393.

23. *Trumbo v. Curtwright.*

should be signed by both the contracting parties, but only "by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

"The principal design of the statute of frauds was," as Lord Ellenborough remarks, in *Cuff v. Penn*, 1 Mau. & Sel. 26, "that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defense in this action. So if the plaintiffs had paid for the goods, according to the oral agreements to pay cash or give security, and the defendants had thereupon completed the delivery of the goods contracted for, it would have been a good performance of the written contract. This has been prevented (if the defendants can prove what they offered to prove) by the plaintiffs' refusal to perform on their part a fair and valid contract. And it is a well-settled principle that if two contracting parties are bound to do certain reciprocal acts simultaneously, the offer of one of the parties to perform the contract on his part, and the refusal of the other to comply with the contract on his part, will be equivalent to a tender and refusal; and in the present case, we think it equivalent to an accord and satisfaction, which was prevented by the fault of the plaintiffs, who agreed, for a valuable consideration—if what the defendants offered to show be true—to vary the terms of the written contract as to the time of payment, and afterwards refused to comply with their agreement. If the defendants on their part had refused to perform the verbal agreement, then indeed it could not be set up in defense of the present action; for the party, who sets up an oral agreement for a substituted performance of a written contract, is bound to prove that he has performed, or has been ready to perform, the oral agreement.

This distinction avoids the difficulty suggested in some of the cases cited, where it is said, that to allow a party to sue partly on a written and partly on a verbal agreement, would be in direct opposition to the requisitions of the statute; and it un-

doubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. We think, therefore, that the evidence of the oral agreements, offered at the trial, should have been admitted; the same not being within the statute of frauds, and the evidence being admissible by the rules of law.

In support of this view of the case, I shall not attempt to reconcile all the conflicting opinions which have been held in similar or nearly similar cases, some of which appear to have been decided on very subtle and refined distinctions. I will, however, refer to a few decisions which bear directly on the present case. The case of *Cuff v. Penn*, 1 Mau. & Sel. 21, is a strong authority in favor of the defendants, as the facts, on which the decision in that case depended, are in all respects substantially similar to those offered to be proved in this action. That was an action for assumpsit for not accepting a quantity of bacon, which by a written contract the defendant agreed to purchase of the plaintiff, to be delivered at certain fixed times. After a part of the bacon had been delivered, the defendant requested the plaintiff, as the sale was dull, not to press the delivery of the residue, and the plaintiff assented. The defendant afterwards refused to accept the residue, and set up the statute of frauds in defense; but the court held, that there was a parol dispensation of the performance of the written contract, as to the times of delivery, which was not affected by the statute of frauds. Lord Ellenborough says: "I think this case has been argued very much on a misunderstanding of the statute of frauds, and the question has been embarrassed by confounding two subjects quite distinct: namely, the provision of the statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract." "It is admitted," he adds, in another part of his opinion, "that there was an agreed substitution of other days than those originally specified for the performance of the contract; still the contract remains. Suppose a delivery of live hogs instead of bacon had been substituted and accepted; might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance."

The principle on which this case was decided is laid down in

several other cases, some of which have been already cited on the other point of defense.

At the argument of the case of *Goss v. Lord Nugent*, Parke, J., remarked, that "in *Cuff v. Penn*, and some other cases relating to contracts for the sale of goods, above ten pounds, it has been held, that the time in which the goods, by the agreement in writing, were to be delivered, might be extended by a verbal agreement. But I never could understand the principle on which those cases proceeded; for the new contract to deliver within the extended time must be proved partly by written and partly by oral evidence." But there is no necessity for the plaintiff to declare partly on the written and partly on the oral agreement. He may always, as before remarked, declare on the written contract, and the defendant will be bound to prove a performance according to the terms of it, or according to the terms of a substituted performance; and performance in either way may be proved by parol evidence: 2 Watts & Serg. 218.¹

Lord Denman, who delivered the opinion of the court in *Goss v. Lord Nugent*, does not question the correctness of the decision in *Cuff v. Penn*; and his remarks on another branch of the statute of frauds seem to be confirmatory of the principle laid down by Lord Ellenborough in the latter case. "It is to be observed," he says, "that the statute does not say in distinct terms, that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and there is no clause which requires the dissolution of such contracts to be in writing." In that action, however, the plaintiff declared partly on the written and partly on the verbal contract, and on that ground it was rightfully enough decided that the action could not be maintained.

In *Stowell v. Robinson*, 3 Bing. N. R., 928, and 5 Scott, 196, it was held, that the time for the performance of a written contract for the sale of lands could not be enlarged by a subsequent oral agreement, although that agreement was pleaded by the defendant as a bar to the action. The plea was, that at the time stipulated for the performance of the written contract, neither party was ready to complete the sale; and the time for the performance was agreed by the parties to be postponed. That decision seems to be founded on the doubt suggested by Parke, J., in *Goss v. Lord Nugent*, and upon the decision in that case, without noticing the distinction in the two cases. And it appears to us, that the case of *Stowell v. Robinson* was decided

1. *McCombs v. McKennan*.

on a mistaken construction and application of the statute of frauds; and that the distinction between the contract of sale, which is required to be in writing, and its subsequent performance, as to which the statute is silent, was overlooked, or not sufficiently considered by the court; otherwise, the decision perhaps might have been different. We think there is no substantial difference, so far as it relates to the statute of frauds, between the plea in that case and the plea of accord and satisfaction, or a plea that the written contract had been totally dissolved, before breach, by an oral agreement; either of which pleas would have been a good and sufficient bar to the action. We are aware that the principle on which *Stowell v. Robinson* was decided, is supported by other English cases cited; but the principle on which the case of *Cuff v. Penn* was decided, is in our judgment more satisfactory and better adapted to the administration of justice in this and similar cases.

It is to be observed in the present case, that the oral agreements, offered to be proved by the defendants, did not vary the terms of the written contract as to its performance on their part; the only alteration was as to the time of payment by the plaintiffs. Such an alteration, made on a good consideration, and before any breach of the contract, may, we think, be proved, without any infringement of the statute of frauds or any principle of law.

New trial granted.

PAROL AGREEMENT MAY BE MADE ON BASIS OF PRIOR WRITTEN CONTRACT: See *Blasdell v. Souther*, 6 Gray, 151; *Kennebec Co. v. Augusta I. & B. Co.*, Id. 208; *Piatt v. U. S.*, 22 Wall. 507; *Emerson v. Slater*, 22 How. (U. S.) 42; *Morgan v. Butterfield*, 3 Mich. 623, all citing the principal case. See also *Vicary v. Moore*, 27 Am. Dec. 323, note 327; *Desharzo v. Lewis*, 24 Id. 769; *Blood v. Goodrich*, Id. 121, note 129, where other cases are collected.

PARTIES MAY ENLARGE TIME OF PERFORMANCE OF WRITTEN CONTRACT by parol agreement: *Rockwood v. Alcott*, 3 Allen, 462; *Lerned v. Wannemacher*, 9 Id. 418; *Bacon v. Cobb*, 45 Ill. 56, all citing the principal case. See also note to *Blood v. Goodrich*, 24 Am. Dec. 129, where cases are collected; *Desharzo v. Lewis*, Id. 769.

THE PRINCIPAL CASE IS DISTINGUISHED in *Loring v. Alden*, 3 Metc. 579, and followed in *Stearns v. Hall*, 8 Cush. 31, 34, and in *Whittier v. Dana*, 10 Allen, 326, 327.

AM. DEC. VOL. XXXVII—11.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

PLANTERS' BANK v. MARKHAM.

[5 HOWARD, 397.]

THE USAGES AND CUSTOMS OF A BANK BIND THE PARTIES to a note made payable there.

WHERE BY THE CUSTOM OF A BANK THE MAKER OF A NOTE payable there has until the close of business hours within which to pay, a demand of payment will not be sufficient to charge the indorsers unless the note is left at the bank until the close of business hours.

ASSUMPT on a promissory note executed by Markham and indorsed to the Planters' bank. The note was made payable at the Commercial bank of Natchez. The evidence on the trial established that by the custom of that bank, the maker of notes payable there had until three o'clock to pay them; it also appeared that the note in question had been there presented by the agent of the Planters' bank before the close of business hours, and that upon payment being refused he had withdrawn, taking with him the note. The indorsers upon the note, defendants in the action, requested the court to charge the jury, that the custom of the bank was binding upon the parties to the note, and that if such a custom as that mentioned above had been established, then that the note was not payable before three o'clock, and no demand before that time would be sufficient to bind the indorsers, unless the note was left at the bank. This instruction was refused and the jury was informed by the court that a demand of payment at any time between ten and three o'clock would be sufficient.

G. S. Yerger, for the plaintiff in error.

Wilkinson, contra.

By Court, TROTTER, J. The opinion of the court below, as expressed, was certainly erroneous. The law upon this subject is well settled by numerous and repeated decisions of the most respectable courts in this country; that where a contract is made with a banking corporation, or a note is made payable there, the usage and custom of the bank constitute a part of the contract, and the parties so contracting are bound by it; not upon the ground that this usage changes the general rules of law, but that by so contracting they have impliedly consented to be bound by it, and to substitute it for the general law. This is the principle of the decision in the case of *Jones v. Fail*,¹ 4 Mass. 251; and also of that in 1 Pet. 33.² When the custom of the bank is known to the contracting parties, it therefore constitutes a part of the contract, and they can receive no prejudice by being held to it. And though an express knowledge of this usage be not shown, it may be implied from circumstances, and they are equally bound or equally exonerated. In the case of *Mills v. The Bank of the United States*, 11 Wheat. 130,³ the court say: "That when a note is payable or negotiable at a bank whose invariable usage is to demand payment and give notice on the fourth day of grace, the parties are bound by it, whether they have a personal knowledge of it or not. In the case of such note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make their securities negotiable." It follows as a necessary consequence of this doctrine, that a note or other security thus payable at a bank can not be considered as due until the expiration of the hour allowed for payment by the invariable usage of the bank, and that it must be left at the bank until the completion of the allotted period. The case of the *Boston Bank v. Hodge et al.*, 9 Pick. 420, decides the very question now before the court. In that case the distinction is taken between a personal demand of payment of the maker, which may be made at any time during business hours of the day the note falls due, and a demand at the bank when the note is made payable there, which must conform to the usage which prevails. That case decides this. For as the note, according to the custom of the bank, was not due until the expiration of the business hours of that institution, to demand payment before that time, without leaving the note in bank, was premature and not sufficient to charge the indorsers.

The judgment must therefore be reversed, and a *venire de novo* awarded.

1. *Jones v. Fales*.2. *Bank of Washington v. Triplett*.

3. 11 Wheat. 431.

COLEMAN v. ROWE.

[5 HOWARD, 460.]

INDEPENDENT COVENANTS—WHERE A DAY IS FIXED FOR THE PAYMENT OF MONEY, which is to happen before the performance of that which is the consideration of the payment, the covenant for payment is independent, and may be enforced, though there has been no performance of the consideration. Within this rule an agreement to pay an installment of the purchase price of land is independent of the covenant of the vendor to convey the title after the entire purchase price has been paid.

IDEM.—EQUITY WILL NOT ENJOIN THE COLLECTION OF AN INSTALLMENT of the price due on a sale of lands, the title to which is to be made by warranty deed, after the entire price has been paid, upon the ground that the vendor has no title, where the latter has been guilty of no fraud, and the vendee has not been evicted from the tract sold.

BILL in equity. In 1837, defendant sold complainant a tract of land containing about three hundred and sixty acres for seven thousand and two hundred dollars, payable in three equal installments; one payable as soon as possession was delivered; one on the first of January, 1838; and one on the first of January, 1839. The agreement of the parties was that defendant should convey the title as soon as the payments were completed, and as part of the agreement defendant executed a bond for title, affirming his ability to make good title. Complainant paid one thousand seven hundred dollars on the first installment, and gave notes for the remaining seven hundred dollars. He now sought a rescission of the contract and an injunction against collection of the unpaid installments, alleging that the title to the larger and more valuable portion of the land was in Tishoma, a Choctaw Indian, to whom the land had been awarded by the United States commissioners under the treaty of Dancing Rabbit creek; and that defendant was in such a pecuniary condition that nothing could be recovered upon his covenant, and therefore complainant would lose his money unless the contract was rescinded. The pleadings of defendant denied the allegation of insolvency, and that the title to any portion of the land sold was in Tishoma, and were accompanied by exhibits which showed a regular derivation of title from the government to the defendant. The evidence as to insolvency was conflicting. As to the title which was asserted to be in the Indian, complainant introduced evidence which he claimed proved a compliance upon his part, before the inception of defendant's title, with the provisions of the treaty of Dancing Rabbit creek, sufficient to have invested him with the legal title to the land. The injunction upon this showing was dissolved.

W. & G. S. Yerger, for the appellant.

Thompson, contra.

By Court, TROTTER, J. The exhibits referred to in the answer fully support the statement of a regular derivation of title by appellee, from the general government, to all the lands sold by this contract to appellant. Sundry depositions were taken to prove the paramount title which is stated to be in Tishoma; but no question is made of appellee's title to the residue. The preponderance of the proof is against the alleged insolvency of the appellee. Upon this statement of the case, the chancellor dissolved the injunction. It is important in considering the question of the appellant's title to relief in this case, to examine the character of the agreement which is disclosed by the record, and whether the promise to pay the purchase money is dependent or independent. The general rule appears to be, that the intention of the parties, to be gathered from the whole contract, is the criterion of the question. Thus where a day is fixed for the payment of money, or part of it, and the day is to happen, or may happen, before the thing which is the consideration of the money is to be performed, an action may be brought for the money before performance; for it appears that the party relied upon his remedy: 1 Saund. 319;¹ 2 H. Bl. 389;² 20 Johns. 15;³ 5 Cow. 509;⁴ 15 Mass. 471.⁵

In the case just mentioned, where a day is fixed for the payment of money, or part of it, the courts have held that the promise or covenant is independent, because it appears to be the intention of the vendee to pay at all events. And hence, where the covenant is to pay the purchase money by installments, or where part is paid down, and the balance is to be paid by installments, it has been held that the agreement to pay in this manner is independent. This rule applies as well to contracts for the sale of land as of other property; and is therefore an exception from the general principle which prevails in the construction of this class of agreements; which is, that contracts for the conveyance of land are to be considered mutual and independent, so that the vendor shall not be compelled to part from his land without receiving the consideration agreed upon, nor the vendee to pay the money without the conveyance of the land. This is the doctrine of the case of the *Bank of Columbia*

1. *Perdage v. Cole.*

2. *Terry v. Duntze.*

3. *Robb v. Montgomery.*

4. *Champion v. White.*

5. *Gardiner v. Corson*; 8. O., 15 Mass. 500.

v. *Hagner*, 1 Pet. 465, and is founded in a wise policy to prevent great injustice; since otherwise the party might be exposed to irreparable loss. But whilst the principle is thus broadly laid down, and so fully sanctioned by reasons of expediency and justice, it must of necessity yield in all cases to the agreement of the parties, which shows that it was the intention to waive its benefit. The rule, therefore, prevails only in cases where the parties have not manifested an intention, by the terms of their contract, to place themselves under a different one. And this is fully recognized by the court in the case referred to.

It is true, that in the particular case then under their consideration, the court held the contract to be dependent, although the agreement of the vendee was to pay by installments; a determination which would seem to be founded on the peculiar circumstances of the contract. *Hagner* submitted a proposition in writing to purchase the lots of the bank, and to pay the purchase money in six quarterly installments; for which he would give his notes, if the bank would give him the title. If the bank preferred it, however, he would take a bond for the title when the payments were completed. It was upon this proposition that the action was brought; and the court decided that the bank was bound to show a tender, either of the bond or deed, before they could recover.

The agreement of *Hagner* to pay, or to execute his notes, was evidently dependent upon the performance of the condition upon which they were to be made. He was to have a bond for title, or the title itself, and this was the entire consideration of his contract. It is, therefore, entirely a different case from the one at bar. The vendee here received a security for the title in the bond of the vendor, conditioned for a deed when the last payment of the purchase money was made. And it is evident that he intended to rely upon his remedy on that security, from the fact of his having paid part of the money at the time, and promising to pay the larger portion of the whole sum agreed upon at times anterior to the day or event on which he could demand the title. The principles settled in the case of *Newman v. Gibson*, 1 How. 341, are decisive of this question; for the contract in that case was very similar in its terms to the one which is shown in this. And upon a careful examination of the authorities, we feel satisfied to adhere to the doctrine there laid down. Hence we conclude, that the agreement of the vendee in this case, to pay the money, was independent of the performance of the covenant for title on the part of the vendor.

The vendor agreed to convey the title when the last payment was made. It thus appears that the payment of the money was to precede the conveyance; and according to the case of *Robb v. Montgomery*, 20 Johns. 16, "when the payments are to precede the conveyance, it is no excuse for the non-payment that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay offers to do so on receiving a good title, when it must be made to him, or the contract may be rescinded." So in the case of *Miller v. Long*, 3 A. K. Marsh. 335, it was stated that the vendor was not bound to convey the title until the purchase money was paid. So also in the case of *Saunders v. Beal's Administrators*, 4 Bibb, 342, where the agreement was to pay the purchase money in three years, and the vendor covenanted to convey the land in twelve months, or so soon thereafter as the consideration money shall be paid, it was held not to be a good answer to an action to recover the money that the vendor had not conveyed the land and was not able to do so, though the vendee averred a tender of the purchase money, and a readiness to pay upon receiving the deed. And in the case of *Champion v. White*, 5 Cow. 510, the defense was an inability on the part of the vendor to convey a part of the land; but the court, after deciding that the promises were independent, held the defense not to be tenable.

The bill of complaint in this case does not aver any offer on the part of the vendee to comply with this contract by paying or tendering the purchase money, nor any demand of the title, but claims a rescission of the contract on the ground of an inability on the part of the vendor to convey the title. And it is insisted that the court can not compel the party to take a defective title, or to resort to his remedy upon the covenant. That where the contract is executory and the vendor is unable to comply with his covenant, the vendee may elect to sue upon the covenant or disaffirm the contract, notwithstanding he has gone into possession and there has been no eviction. The rule appears to be well settled both in England and in this country that in the case of a purchaser of land, where the title fails, a court of chancery will decree a return of the purchase money, even after the complete execution of the contract by payment of the money and delivery of the deed, if there has been a fraudulent misrepresentation as to the title. But it seems to be settled in England, and by most of the courts in this country, if there is no fraud, and the purchaser is not evicted, that the insufficiency of the title is no ground for relief against the payment of the

purchase money, or for rescinding the purchase, and claiming restitution of the money. The party is remitted to his remedies at law on his covenants to insure the title: 2 Kent Com. 370; *Abbott v. Allen*, 2 Johns. Ch. 519 [7 Am. Dec. 554]; 3 A. K. Marsh. 335;¹ 4 Bibb, 342;² 5 Conn. 528;³ 1 Greenl. 352;⁴ 5 Cow. 510;⁵ 9 Johns. 126.⁶ The case of *Newman v. Gibson*, 1 How. 341, was decided in conformity with the principles of the above cases. And although we may doubt the policy of this doctrine in its general application, and believe that the justice of the case may often be with the defense, yet it is now too well settled to be departed from.

If then, there has been no fraud, nor any eviction, and the agreement is executed, the vendee can have no claim to relief on the mere ground of a failure of title: 1 Johns. Ch. 213.⁷ But as in the present case the deed has not been delivered, the contract remains executory and a different rule it is said must prevail. This distinction is laid down and supported by the court in the case of *Miller v. Long*, 3 A. K. Marsh. 335. In that case the right of the vendee to be relieved where the deed has been delivered is denied; but it is said to be otherwise where the contract is executory to execute the deed in future. In the first case the court recognizes the general rule laid down, that the vendee must resort to his remedy at law upon his covenants. But in cases like the present where the vendee takes the precaution to secure himself by a penal bond covenanting to convey a title with full covenants, and that appears to be the consideration of his promise to pay the money, though we may consider the covenant to convey as an executory contract, yet it is difficult to conceive how that circumstance can vary the rule as to relief. In the latter case the vendee has his remedy at law upon the covenants in the bond, and he would seem to be equally subject to the general rule to resort to that remedy if there is no fraud or eviction.

In this case the vendee was put in the possession of the land, and has continued in the quiet and undisturbed possession for a period of nearly four years, and for aught that appears to the court may never be disturbed by the alleged outstanding title of the Indian. He has not even been threatened with this title, and no step has been taken by the Indian to enforce it. Under such circumstances it seems to us that it would be contrary to every principle to go into an inquiry as to this title, or to settle

1. *Miller v. Long*.

2. *Saunders v. Beal*.

3. *Berkhamsted v. Case*; S. O., 13 Am. Dec. 92.

4. *Lloyd v. Jewell*; S. O., 10 Am. Dec. 73.

5. *Champion v. White*.

6. *Greenby v. Cheevers*.

7. *Bumpus v. Plainer*.

its paramount validity, in this collateral proceeding, when the Indian is not before the court, when his title is flatly denied by the vendor, and when he has not for himself thought proper to assert it by any adverse proceeding. Such were the views entertained by the supreme court of this state in the case of *Miller v. Owens* and others, Walker, 244, and they seem to us to be fully sustained by the chancellor in New York in the case of *Abbott v. Allen*, 2 Johns. Ch. 519 [7 Am. Dec. 554]. In that case the chancellor reasserts the principle which was established by a former decision in the same court in the case of *Bumpus v. Platner*, 1 Johns. Ch. 213, "that a purchaser of land who is in possession can not have relief here, against his contract to pay, on the mere ground of a defect of title, without a previous eviction." And adds, "that if there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure of title." It would lead to the greatest inconvenience to permit a purchaser in the actual enjoyment of land, and when no person asserts or takes any measures to assert a hostile claim, to stop the payment of the money on suggestion of a defect of title, and on the principle of *quia timet*.

Hence we conclude, that the appellant is not entitled to relief in this case, 1. Because his contract to pay money was independent of the covenant of the appellee to make him a title. He agreed to pay the money at all events, and relied upon the covenants in the bond for a title. 2. Because he was put in possession of the land and has continued in the undisturbed possession since the time of the contract, and there is no fraud proven upon the vendor, and there has been no eviction by paramount title. 3. And also because there is no proof of a defect or failure of title which can be noticed by this court. The answer denies the outstanding title, and it has not been duly ascertained in any of the modes by which it can be recommended to the consideration of the court.

The decree of the chancellor must therefore be affirmed, with costs to the appellee.

COVENANT TO PAY PORTIONS OF THE PURCHASE MONEY before the day fixed for the execution of a conveyance by the vendor, is independent: *Bean v. Atwater*, 10 Am. Dec. 91.

MITCHELL v. EVANS.

[5 HOWARD, 548.]

EXECUTION ISSUED AFTER A YEAR AND A DAY on a judgment which has not been revived by *scire facias* is but voidable, not void.

PURCHASER AT A SALE UNDER A VOIDABLE EXECUTION will be protected.

DETINUE. The opinion states the case.

Holt, for the plaintiff in error.

N. D. Coleman, contra.

TROTTER, J. This was an action of detinue for a slave. It appears from the bill of exceptions, that the claim of Mitchell to the slave in controversy arose under a purchase by him, at a sale made by the sheriff, on an execution against one Burnham. The plaintiff in error derived title also under Burnham. On the trial, the court was requested to instruct the jury, that the execution under which Mitchell claimed was absolutely void, as it had been issued on a judgment rendered more than a year and a day, which had not been revived by *scire facias*. The court gave this instruction; and informed the jury, moreover, that Mitchell could acquire no title under that sale. The defendant below excepted.

This instruction was clearly erroneous. The execution was only voidable, but not void. The judgment was entirely regular; and a purchaser at a sale under an execution issued upon it, which is merely irregular or voidable, can not be prejudiced for that reason. The authorities are full and direct on this question: 2 How. 607;¹ 16 Johns. 537.²

There are several other questions in this case; but it is not deemed important to notice them, as they are subordinate to the one which has been considered.

For the error of the court below, in giving the instruction above, the judgment must be reversed, and a *venire de novo* awarded.

EXECUTIONS, WHEN VOIDABLE: See *Day v. Sharp*, 34 Am. Dec. 509; *Boren v. McGhee*, 31 Id. 695; *Collingsworth v. Horn*, 24 Id. 753, and note.

ANDERSON v. WANZER.

[5 HOWARD, 587.]

THE ANSWER AND ADMISSION OF ONE PARTNER UPON PROCESS OF GARNISHMENT, where both have been regularly served with process, will bind the other.

EXECUTION, ON A JUDGMENT AGAINST A GARNISHEE on a debt not yet due, is stayed by operation of law until the debt does become due, and therefore the judgment need not be accompanied by an order of court directing the stay.

ERROR from Claiborne circuit.

1. *Smith v. Winston*.

2. *Jackson v. Robbins*.

Tharp, for the plaintiff in error.

Thrasher, contra.

By Court, TROTTER, J. The defendant recovered a judgment in the court below against John G. Hastings, for the sum of seven hundred and sixty-one dollars and ninety-four cents. He then applied for and obtained a garnishment against the plaintiffs in error on a suggestion that they were indebted to Hastings, according to the provisions of the act of 1827. Upon the return of the process, H. O. Anderson, one of the firm of H. & H. O. Anderson, who were merchants and partners, answered, and stated an indebtedness of his firm to Hastings, in the sum of seven thousand five hundred and eleven dollars and sixty cents, which existed by virtue of three notes, two of which would be due the twentieth of January, 1840, and the other on the twentieth of February, 1840. Upon this answer the court rendered judgment against the garnishees for the amount of the judgment which Wanzer, the defendant in error, had recovered against Hastings, and ordered execution to be stayed until January, 1840. Two errors have been assigned: 1. That the court rendered final judgment against both the garnishees upon the answer of one only. 2. In rendering the judgment without a stay of the execution until the maturity of the debt, it not being then due.

We do not think that either of these objections is sufficient to reverse the judgment. The garnishees being partners, the answer or admission of one was sufficient to bind the other. H. O. Anderson, as the record shows, answered for himself and partner. They had both been regularly served with the process, and as the purpose of the garnishment was to ascertain whether they were indebted to Hastings, that object was surely as well obtained by the admission of the fact by one partner as by both. It will not be denied, that in an ordinary suit against partners, to recover a partnership debt, an acknowledgment of the debt by one of the partners will be received as evidence to bind both, and justify a verdict and judgment against both. This is a principle of the law of partnership too familiar to need authorities to support it. Nor can it be an objection to the judgment, that it is not accompanied by an order of the court to stay execution of it until the maturity of the debt. It is stayed by operation of the statute, until the debt is due. And if it is sued out before that time, it may be arrested, on motion or *supersedeas*. The act of 1827 does not require the stay of

execution to be made a part of the judgment. After authorizing the court to render judgment against the garnishee, the statute adds, "but execution shall be stayed, etc., until such garnishee's debt shall become due," etc.

The judgment must be affirmed.

BARNES v. MOODY.

[5 HOWARD, 636.]

RELEASE OF ERRORS IN A JUDGMENT IS PLEADABLE IN BAR of the assignment of errors in the appellate court.

FORBEARANCE FROM THE ENFORCEMENT OF A LEGAL RIGHT is a sufficient consideration to support a release of errors.

ERROR from Hinds circuit. The facts appear from the opinion.

Mayes and Clifton, for the plaintiff in error.

Shelton, contra.

By COURT. A proceeding of unlawful detainer was instituted by the defendant in error before a justice of the peace of Hinds county, to recover possession of a piece or lot of land in the city of Jackson. The cause was submitted to a jury, which appears to have been brought before the justice, who rendered a verdict for the plaintiff below. There was but one justice who appears to have presided at the trial. An appeal was taken to the circuit court, and a verdict there obtained by the plaintiff, and a judgment and award of the writ of *habere facias* possession. After the writ was issued, the defendant, in consideration that the plaintiff would stay the execution for a certain time, signed and sealed and delivered to the plaintiff a release of errors in the judgment, and this release is pleaded in bar of the assignment of errors in this court, and the demurrer filed to the plea presents for our consideration the simple question whether the plea be a valid one.

This question has been so repeatedly decided that it is only necessary to refer to the authorities upon the subject for the reasons of the opinion of the court in the present case: 2 Tidd's Pr. 1170, 1172, 1174, and the authorities there cited. It is surely as competent to a party against whom a judgment has been rendered to release his right to prosecute a writ of error, as to surrender any other cause of action which he may possess. The consideration for the release in this case was the forbearance of the plaintiff to execute the writ of *habere facias* possession, and

this was a valuable consideration, as much so as forbearance to sue has been held to be a good consideration to support a promise founded thereon.

The demurrer to the plea must therefore be overruled, and the judgment of the court below affirmed.

CONNELL v. WOODARD.

[5 HOWARD, 665.]

OPERATION OF THE RULE THAT A PERSON CAN NOT BE PARTY PLAINTIFF and also defendant is confined to natural persons.

TRUSTEES OF SCHOOLS CONSTITUTE QUASI CORPORATIONS, and may, in their corporate character, sue their own members. It will not affect the rule that the action is brought in the names of the individual trustees, instead of under the general title of trustees of schools.

ASSUMPSIT. The opinion states the case.

Boyd and Montgomery, for the plaintiffs in error.

Walker and Smith, contra.

By Court, TROTTER, J. This was an action of assumpsit upon four promissory notes made by the defendants to the plaintiffs as trustees of schools and school lands in a certain township of land in Wilkinson county. The defendants pleaded the general issue and two special pleas. The special pleas averred in substance that Woodard and Mayes, two of the defendants, were also plaintiffs in the suit. The plaintiffs demurred to each of the pleas, but the court overruled both demurrers, and gave judgment for the defendants. The material error assigned is the judgment of the court below upon the demurrers.

That the same person can not be plaintiff and defendant in the same action is a proposition which must command universal assent, since no man can sue himself. The operation of this rule is, however, confined to natural persons, and then it seems to be equally applicable to persons suing in their own right and to those who sue in a fiduciary character. This was the ground of the decision in the cases cited by the counsel for the defendants from 1 Ala. 103,¹ 148.² And for the same reason it has been held that an administrator can not, though a mere trustee, sue himself to recover a debt due from him to his intestate. The remedy in such case is suspended at common law, and varied by our act of assembly. This was incidentally adverted to

1 *Kendal v. Bright*, Minor, 103.

2. *Ramsey v. Johnson*, Minor, 418.

by the court in the case of *Kelsey v. Smith*, 1 How. 82. If the administrator does not return in his inventory a debt due from himself, any party may petition the court of probates and compel him to do so, and if after the return he do not pay it, his official bond may be sued on. This case only shows the rule which is everywhere recognized that an administrator can not be plaintiff and defendant in the same suit; any more than one who sues in his own right. But it is urged by the counsel for the defendants that the trustees of schools in this state are liable to the operation of this rule just as an administrator or any other trustee; that they are not artificial persons or a body corporate. We think, however, that there is a wide distinction between the two cases. An administrator is a trustee *pro hac vice* only. He is clothed with no one of the attributes of a corporation. The trustees of school lands are endowed with many of the functions of a corporation. They have perpetual succession in respect to the matters of their trust. It is true, they never have been incorporated by a particular name, nor have they been invested with plenary powers. Having been created by the law for particular and specified purposes, and for the accomplishment of such objects been invested with the right of succession, they are corporations *sub modo* it is true, but yet they are not the less a corporation for the proper purposes of their creation. Our laws afford us many examples of this sort. Thus the loan officers who are created for each county in the state of New York, by an act of the legislature of that state, have been held to be bodies politic and corporate. So the board of supervisors who are authorized to take obligations to them and their successors in office, by having thus the right of succession secured to them, have been classed among corporations: 2 Kent Com. 225; 8 Johns. 422;¹ 2 Johns. Ch. 325.²

The trustees of schools and school lands, whose appointment is provided for by the statute of this state, are authorized to appoint a treasurer, and to take a bond from him, payable to themselves and their successors in office, to lease the lands reserved in their respective townships for schools, and to take notes or bonds with surety payable in like manner, for the money due for the lease of the same. Being thus endowed with the right of perpetual succession for all the purposes of their creation, they may well be termed *quasi* corporations, as they have been: Ang. & Ames on Corp. 16. This being the case, they are of course subject to the rules which govern other corporations;

1. *Jackson v. Hartwell*.2. *Denton v. Jackson*.

they might have sued under the general title of trustees of schools and school lands. And having the power to do so, the rule is not varied because the names of the several persons who composed the board have been stated in the pleadings. If these views be correct, then it follows that the board of trustees have the same capacity to maintain an action at law against one of its members, who has come under obligation to them by a contract authorized by law, that a bank or other proper corporation possesses in like cases. The ground of defense disclosed by the two special pleas, is therefore no legal answer to the action, and the demurrers should have been sustained.

It is not deemed necessary in the present case to go into an examination of the other question which has been submitted in the argument by the counsel for the defendants; whether under the act of congress which reserves the sixteenth sections of land from sale, and for the use of schools in the townships, is a grant, so as to authorize the various acts of the legislature which have from time to time been passed. This power has been so long recognized and acted on, that we do not feel inclined to question it at this time, even if we entertained any doubts of its existence. Congress itself has been a witness of the course of legislation in this and other states on the subject of these lands, and has never offered any objection, nor questioned its propriety, and we shall not do so.

The judgment must be reversed, and the cause remanded for further proceedings.

SCHOOL DISTRICTS CONSTITUTE QUASI CORPORATIONS: *Andrews v. Estes*, 26 Am. Dec. 521.

BULLIT v. THATCHER.

[5 HOWARD, 639.]

REQUEST BY ACCOMMODATION INDORSERS upon the holder of a protested note, that he immediately proceed to sue the maker, accompanied with the information that upon a failure so to do they will hold themselves discharged, imposes no duty upon the holder; nor will the indorsers be discharged because the maker of the note, subsequently to the request which has not been complied with, becomes insolvent.

ACTION against the indorsers on a bill of exchange. The opinion states the case.

Holt, for the plaintiffs in error.

G. S. Yerger, contra.

By Court, SHARKEY, C. J. The defendants were accommodation indorsers of a bill of exchange drawn by John F. Broadnax, dated first of January, 1837, payable in New Orleans, at six months, which was protested for non-acceptance on the sixteenth of the same month. The holders, the plaintiffs in error, are citizens of New Orleans, the maker being also a citizen of the state of Louisiana, and the defendants are citizens of this state. On the twenty-fourth of March, 1838, the defendants wrote to the plaintiffs, and requested them to sue the drawer of the bill immediately, or they would consider themselves discharged. The maker at that time had twelve or fifteen negroes unincumbered, but conveyed them away in June, and shortly afterwards died insolvent. On the sixteenth of April, 1838, this suit was brought, and on the trial the defendants relied on the notice and the failure to sue, as a discharge, and so the court instructed the jury, which is now assigned as error.

The question here presented has received frequent adjudications, and some difference of opinion seems to exist in regard to the rule of law. It is contended that an accommodation indorser is but a surety, who has a right to require diligence of the holder in suing the principal, and authorities are cited which do sustain this position. To a certain extent, and for certain purposes, an accommodation indorser may be regarded as a surety. The object of such an indorsement is to secure the debt, but the undertaking or contract in a strictly legal point of view is materially different from that of an ordinary surety. In the one case it is several only, whilst in the other it is always joint, or joint and several. An indorser undertakes to pay the debt himself on condition; when the condition is performed by giving him notice of demand and refusal, his undertaking becomes absolute; it is not secondary. The holder of a protested bill may proceed against either or all of the parties to it, at his election, but by separate actions. Our statute, it is true, has changed this rule, but it does not apply in this case, because the maker was not a citizen of the state.

By the common law there was neither a legal nor an equitable obligation on the holder to sue the maker first, and if he may sue any party, how can it be that an indorser is discharged if the holder fails to sue the maker on request? Such a proposition is at war with principle. It is repugnant to the nature of the contract. To illustrate it by the case before us: Thatcher and Bodley say to Bullit, Shipp & Co., we are but accommodation indorsers for Broadnax; sue him immediately or we shall

consider ourselves discharged; and thereupon they immediately sue Thatcher and Bodley, but do not sue Broadnax. Can any one question their right to do so? Certainly not. Could Thatcher and Bodley say, we did not tell you to sue us, but Broadnax, which you were bound to do? Would such an answer constitute any defense to the action, and if it would not, there is no foundation for the position. As regards indorsers, the notion of their being discharged by the delay of the holder is predicated on the assumption that the drawer must be first sued, or at least it resolves itself into that, and as that is not true in principle, the idea is fallacious.

When a note or bill is protested the indorser stands as an individual contractor, bound to lift the bill immediately, and will the law favor him, and ultimately discharge him for standing out in violation of his contract? The law does not suppose that he can be injured by delay. It does not tolerate delay on his part, but requires immediate payment. If he is to be discharged by a failure to sue the maker, even after notice, it is but a reward for a breach of contract and of good faith. He has his recourse against the maker, and if there be danger of losing that by delay, his duty is plain; let him pay the debt according to his contract and take his recourse. His condition and his liability are different from a surety in a bond. A mere surety in a joint liability may resort to chancery and compel the holder of the bond to use proper diligence. In both cases, however, a new and binding contract for delay would discharge the surety. This view of the subject seems to be the necessary result from the nature of the contract, and it is supported by most of the adjudged cases. It is true that the decisions are conflicting. The cases of *Pain v. Packard*, 13 Johns. 144 [7 Am. Dec. 369], and *King v. Baldwin*, 17 Id. 384 [8 Am. Dec. 415], seem to be leading cases in favor of the defense here set up, and yet they have been much questioned even in New York. The question was very fully investigated by Chancellor Kent in the last case cited, reported in 2 Johns. Ch. 554, and he even denied the law to be as decided in *Pain v. Packard*. In the case of *Beardsley v. Warner*, 6 Wend. 610, the court refused to apply the rule established in *Pain v. Packard*, to the indorser of a promissory note, and he was consequently held responsible, although he had given notice to sue. The court said: "The moment the note is dishonored and notice of that fact duly given to the indorser, the holder's right to sue him is per-

fect, and this right is not impaired as long as he remains passive."

These remarks apply with all their force to the present case, and it is an authority directly in point, so that even in New York, where mere sureties are held to be discharged if prejudiced by delay, indorsers are placed on a different footing. In Tennessee and Alabama the courts have adopted the rule of *Pain v. Packard*, and have also applied it to indorsers. In the case of 10 Yerg.¹ the court admitted that if the question were *res integra*, they might have decided differently; but the question was settled in the case in 2 Yerg.,² and they would not depart from it. In that state there is a statute which may have had an influence on the decision. Contrary decisions, however, are numerous, in which the defense here set up has been overruled. The point was made in *Crane v. Newell*, 2 Pick. 612 [18 Am. Dec. 461], and held to be no defense. The reporter has added a note of many authorities to the same effect. The case of *Hunt v. Bridgham*, Id. 581 [13 Am. Dec. 458], was of the same kind. These were cases of sureties, not indorsers, and if sureties will not be discharged by mere delay, unaccompanied with fraud, or an agreement not to prosecute the principal, certainly indorsers will not.

The same doctrine is reiterated in the case of *Frye v. Baker & Jennings*, 4 Pick. 382, which was also a case of mere suretyship. The case of *Billows v. Lovel*, 5 Id., was a suit on a joint and several promissory note, and it was held that the refusal of the creditor to sue the principal on the request of the surety, unaccompanied with an offer of indemnity against the costs and charges of the suit, is not a defense at law for the surety, although the principal may have become insolvent. Now even if these defendants occupy the attitude claimed for them of mere sureties, still by these authorities, their defense must be unavailing.

But the Massachusetts cases do not stand alone. They are fully sustained by the cases cited by counsel from 1 Bailey,³ 3 Call,⁴ 1 Leigh,⁵ and 5 Monroe.⁶ The case of *Kerr, Adm'r, v. Baker*, Walker, 140, was a case of a surety; and it was held that he was not discharged by the failure to sue the principal, after notice given to do so. The most of these cases are in exact harmony, and must be considered as decisive of this question.

The judgment must be reversed, and the cause remanded.

See *Lambert v. Sandford*, 18 Am. Dec. 149.

1. *Thompson v. Watson*, 10 Yerg. 362.

4. *Croughton v. Duval*, 3 Call, 69.

2. *Hancock v. Bryant*, 2 Yerg. 476.

5. *McKenny v. Waller*, 1 Leigh, 434.

3. *Bank of S. C. v. Myers*, 1 Bailey's Law, 412.

6. *Stout v. Ashton*, 5 Monroe, 261.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LORTON v. STATE.

[7 MISSOURI, 55.]

LARCENY OF ARTICLES BELONGING TO DIFFERENT OWNERS, if at the same time and place, constitutes but one offense.

INDICTMENT for larceny. The opinion states the case.

T. T. Gantt, for the prisoner.

Bent, for the state.

By Court, **NAPTON, J.** Lorton was indicted by the grand jury of St. Louis county, for stealing the goods and chattels of Richmond Curle, and at the same time was also indicted for stealing the goods of one John B. Gibson. The defendant plead guilty to the first indictment, and to the second pleaded a former conviction for the same offense. It appears from the bill of exceptions that the prisoner on the day mentioned in the indictment, was found in a room of the Missouri hotel, in the city of St. Louis, at a late hour in the evening, and being seized by Richmond Curle, and one John B. Gibson, who were lodgers therein, and who were awakened by the noise made by the prisoner, confessed that he had been concerned in stealing goods therefrom, in company with another, and search being immediately made, the goods of said Curle and Gibson were found lying on the stair steps and in the passage, where they had been dropped by the thief, who was making off with them. The goods of Curle and Gibson were found precisely in the same condition. The prisoner had been sentenced under the first indictment to two years' imprisonment in the penitentiary. The prisoner, by his counsel, prayed the court to instruct the jury, that if they believed from

the evidence that the goods of Curle and Gibson were stolen at one and the same time, then the circumstance of said goods belonging to separate owners did not constitute several offenses, and that if any person by the same act and at the same time should steal the goods of A., B., and C., this constituted but one felony, or offense against the state; and that if they should believe under the preceding instruction, that the stealing of the goods of said Curle and Gibson was one transaction, then the former conviction of the prisoner operated as a bar. The court refused to give this instruction; the prisoner excepted, and moved for a new trial, which was overruled, and the case is brought here by error.

The court should have given the instructions asked by the prisoner. The stealing of several articles of property, at the same time and place, undoubtedly constitutes but one offense against the laws, and the circumstance of several ownerships can not increase or mitigate the nature of the offense.

The judgment will be reversed.

STEALING OF SEVERAL ARTICLES at one time constitutes but one offense: *State v. Daniels*, 32 Mo. 559. This, though the articles belonged to different owners: *State v. Morphin*, 37 Id. 373, citing the principal case.

JONES v. STATE.

[7 MISSOURI, 81.]

STATUTE PROVISION REQUIRING A COURT TO PASS UPON ALL OFFICIAL BONDS, that have been received by the clerk during vacation, at the next term, and approve of or reject the same, is for the benefit of the public, and therefore a failure upon the part of the court to comply therewith, is no defense to an action upon the bond.

RECEPTION AND DETENTION OF AN OFFICIAL BOND, without objection, for a considerable length of time, by an officer who is required by law to pass upon it, is sufficient evidence of his acceptance.

ACTION upon an official bond. The case appears from the opinion.

A. Leonard, for the appellants.

S. M. Bay, contra.

By Court, TOMPKINS, J. This was an action instituted in the name of the state of Missouri, to the use of Blow, in a justices court, against Jones, Miller, and Paulsel, on a writing alleged to be Jones' official bond, as constable, for his failure to make return of an execution delivered to him as constable, to be exe-

cuted. Upon the trial in the justices' court, judgment was given against the defendants, and they removed the cause by appeal into the circuit court of Cole county. In that court the following case was agreed on by the parties, viz.: That Jones was elected constable of the township of Jefferson on the fourth day of August, 1838, and that on the twenty-second day of the same month he as principal, with Miller and Paulsel as securities, signed and sealed an instrument of writing set out in the record, and purporting to be the official bond of Jones as constable; that on the said day of the date of that bond it was offered to the clerk of the county court, as Jones' official bond, and that the clerk received the same, and indorsed it as filed, and to such indorsement subscribed his name, and filed it in his office, where it has ever since remained, and now still remains; that the clerk, at the time of receiving such instrument, was acquainted with the securities, but did not recollect that he exercised his judgment upon their sufficiency, or upon the sufficiency of the bond; that the next succeeding term of the county court of Cole county was held, and that neither at that, nor at any subsequent term of said court was the said instrument of writing either approved or rejected by the court, nor was it ever presented to said court for any action thereon; that the clerk never made any writing or entry either approving or rejecting such instrument, nor did any act approving or rejecting said instrument, except as aforesaid. It was also admitted that Blow obtained a judgment, sued out execution, and delivered it to Jones, the defendant, as stated in the complaint, and that Jones failed and neglected to return the said execution, as charged in the plaintiff's complaint. It was further agreed, that if upon these facts the court should be of opinion that the writing was obligatory upon the defendants, Miller and Paulsel as their bond, their judgment should be given against all the defendants, otherwise it should be given for them. The circuit court decided that the instrument of writing was obligatory on all the defendants, as the official bond of Jones. To reverse the decision of the court on this point this appeal is prosecuted.

The act respecting constables provides, that the bond shall be approved of by the court, or clerk in vacation, and if taken by the clerk in vacation, shall be approved of or rejected by the court at the next term. The delivery of the bond by the defendants is admitted, the clerk received the bond from their hands and marked it "filed," and placed on his files, which he had no authority in law to do unless he had previously exercised his judgment on

the sufficiency of the bond, and approved it. This act of the clerk, then, appears to me to be conclusive evidence that he did approve the bond; for the law nowhere declares in what manner his approbation shall be expressed: See the act at p. 116 of the Digest of 1835. But neither at the next term, nor at any subsequent term, did the county court express any will either to approve or to reject the bond. By this neglect of the county court, the public might be sufferers in case the securities were insufficient (and it is not contended that the instrument of writing is not expressed in apt terms), but certainly the failure of the county court to act on this instrument of writing at the first or any subsequent term, could do Jones and his securities no injury. He wanted the emoluments of office, and he enjoyed them; the action of the court on the bond was required by law only to secure more effectually the interests of the rest of the community. It seems then, to me, that this bond ought to be held good against Jones and his security.

In the district courts of the United States it has been decided that the reception and detention of an official bond by the postmaster-general, for a considerable time without objection, is sufficient evidence of its acceptance: See 1 Peter's Dig. 383; on this authority, then, as well as on the reasonableness of the thing, we may rest an opinion that the clerk of the county court of Cole county accepted and approved the bond in the sense of the statute. In the *United States v. Tivy*,¹ the supreme court of the United States held that a voluntary bond given to the United States and not prescribed by law, is a valid instrument.

The bond of Jones then is good, because he voluntarily with his securities executed it, and its obligatory character is not invalidated because the act of the legislature required him to execute one, although it has not been approved by the court; as before observed, the omission of the county court to approve this bond, could not possibly injure him and his security, and ought not to impair the security which suitors were intended to derive from the action of the county court.

For the reasons above given, the judgment of the circuit court ought to be affirmed, and in this opinion each member of the court concurs; and it is accordingly affirmed.

VALIDITY OF AN OFFICIAL BOND can not be impeached by the officer or his sureties, because it does not conform to the statute, if the bond is in a condition more favorable to them than it would have been had it pursued the statute: *Kincannon v. Carroll*, 30 Am. Dec. 391.

1. *United States v. Tivy*, 5 Peters, 114.

POSEY v. GARTH.

[7 MISSOURI, 94.]

AN EMPLOYEE DISCHARGED BEFORE THE COMPLETION OF THE TIME OF SERVICE for which he has been engaged, for fault or misconduct upon his part, of sufficient aggravation to justify the discharge, is not entitled to any compensation for the services actually performed.

APPEAL from Howard circuit. The opinion states the case.

Clark, for the appellant.

Davis, contra.

By Court, Scott, J. Bird Posey was employed by Dabney Garth, as overseer, for one year, at the price of one hundred and seventy-five dollars; his term of service commenced on the first of January, 1838, and he continued industriously employed for Garth until some time in April following, when Garth told Posey that he must leave his service, that he had been negligent, and had maltreated and injured his negroes. Thereupon Posey left Garth's employment. It appears that Posey, the day before he was ordered to leave Garth's service, for some fault supposed to have been committed by one of Garth's negroes under his control, attempted to punish the negro by whipping; the negro, the bill of exceptions states, resisted by refusing to obey Posey's order. Posey thereupon struck the negro with a handspike and knocked him down, and then beat him with the handspike in such a manner that in four days thereafter he died from the effect of the blows. Posey afterwards instituted an action against Garth for his year's wages, claiming the whole amount, and recovered sixty-one dollars, the costs being adjudged against him. A new trial was asked for by Posey, and refused, and he brings this cause here by appeal. Under this state of facts is he aggrieved by the judgment of the court below? If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant can not recover them before he has performed the year's service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve; but if there is any fault or misconduct in him towards his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages. Reciprocal justice re-

quires that such should be the law of contracts, of this character; if it were otherwise, then while the employer is bound by his contract to retain the servant, although it may be against his inclination, for the whole period of his service, or pay him the whole wages, the servant by his misconduct may compel his employer for his own security to discharge him, and then recover wages for the term he has served. So, while the contract is binding on the employer, the servant is bound or not, at his option. Such a construction of the contract would encourage fraud and wickedness in servants, and induce them, whenever their inclination prompts, to be guilty of such enormities as will compel their discharge.

Justice Lawrence remarked, in the case of *Cutler v. Posver*,¹ 6 T. R. 327, that a servant, although hired in a general way, is considered to be hired with reference to the general understanding on the subject, that the servant shall be entitled to his wages for the time, though he does not continue in the service during the whole year. This remark of the learned judge, torn from its context and placed in some elementary works, has been made to give countenance to the idea, that if there is a termination of the service by the fault of the servant before the time agreed on, the servant is entitled to wages for the time he served, when it is obvious the judge was speaking of the termination of the contract without the fault of the servant, for it is observable that this principle was stated in a case in which the court unanimously held, that if a sailor hired for a voyage, take a promissory note from his employer for a certain sum provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship, he dies, no wages can be claimed either on the contract or on a *quantum meruit*. This case, however, was decided on the peculiar nature of the contract, and is not to be regarded as an authority in support of the doctrine, that if a servant who is hired for a year die in the middle of it, his executor can not recover part of his wages in proportion to the time of service. This was the old law, it is otherwise now.

Was the conduct of Posey such as to warrant his discharge? Have mercy and humanity left this earth, that this question should be asked? Could Garth, as a master owing protection to his slaves, any longer retain such a man in his service, he not only had a right to discharge him, but it was his duty to do it. A mere disobedience of orders seems to have been the fault of the negro; for although the record states that the negro resisted,

1. *Cutler v. Powell*.

yet it appears that his resistance consisted in disobeying orders, and that too when he was about to be whipped. Should one retain in his employment another, who for such a provocation would with a handspike knock down his slave, and then continue his blows until they caused his death?

As it regards the question of costs, inasmuch as the plaintiff was not entitled to recover anything, he can not complain that they were adjudged against him, and as the defendant does not seek to reverse the judgment, let it be affirmed.

WHERE A SERVANT ENGAGED FOR A DEFINITE PERIOD, before its expiration abandons his master's service, he can recover nothing for the services actually performed: *Henson v. Hampton*, 32 Mo. 410; *Schnerr v. Lemp*, 19 Id. 42, affirming the principal case. But if the abandonment is caused by a dereliction of duty upon the part of the master a *quantum meruit* will be sustained: *Sisk v. Cunningham*, 8 Id. 132.

POTTER v. DILLON.

[7 MISSOURI, 228.]

AN ACCEPTANCE BY ONE MEMBER OF A FIRM OF A BILL OF EXCHANGE, which represents a private debt of his own, binds the firm, if the holder of the bill was ignorant of the nature of its consideration.

ACTION upon an acceptance of a bill of exchange. The opinion states the case.

Gamble and Walker, for the appellant.

Holmes, contra.

By Court, TOMPKINS, J. Potter brought this suit against Dillon before a justice of the peace. The matter being submitted to the justice, he found a verdict and gave a judgment for the plaintiff. The defendant Dillon then appealed to the court of common pleas. In this court the evidence was detailed to a jury, and a verdict being found by them for the plaintiff, the court gave a judgment accordingly. The suit is brought on a bill of exchange, drawn by one Charles F. Downing on Reilly and Dillon, in favor of the plaintiff, Potter. This bill was accepted in writing by Reilly & Dillon. The acceptance was in the handwriting of Reilly; at the time of the acceptance Reilly was a partner of Dillon in business. Evidence was given by the defendant to prove that nothing was found on the books of Reilly and Dillon to show that there had ever been any dealings betwixt the plaintiff and the firm of Reilly & Dillon; but that

previously to the partnership betwixt them, there had been some business transactions betwixt the plaintiff and Reilly, which were not known to be settled. That the drawer had been, and was at the time the bill was drawn, a clerk of Reilly & Dillon. A letter from the plaintiff to Dillon was also read in evidence, in which Potter states that he holds an order drawn by Charles F. Downing for one hundred dollars, and accepted by Reilly & Dillon, etc. He says something is due, he supposes about fifty dollars. The court instructed the jury, that if they believed that this acceptance was given by Reilly to plaintiff to pay a separate debt of Reilly, and that Potter knew that Reilly was using the partnership name to secure his own private debt, they will find for the defendant. The defendant moved for a new trial for the usual reasons, that the verdict was against evidence, etc., and that the jury were misled by the instructions of the court.

The instructions of the court were in my opinion, and according to the showing of the defendant himself in his brief, very correct. This being my opinion, it might be sufficient to stop, but the defendant, appellant here, seems to think that after a finding against him by a justice of the peace acting the part of a jury, and also by a jury acting under the direction of the court of common pleas, that still the finding is against evidence. To order a new trial in such a case would be but an appeal from one jury to another, with this further evil, that it would hold out a temptation to parties, even honest parties, to be negligent in the production of their evidence in the first trials. The court of common pleas, with better opportunity to judge of the credit due to the witnesses, than we have, was satisfied with this verdict. But the defendant has not even taken the precaution to exclude the presumption that there might have been other evidence given to the jury.

The judgment of the court of common pleas is affirmed.

A NOTE EXECUTED BY ONE PARTNER in the firm name, and issued in payment of his private debt, is not binding upon the firm if the party receiving the note knew of its consideration: *Lansing v. Gaine*, 3 Am. Dec. 422; *Livingston v. Roosevelt*, 4 Id. 273; but if such note has passed into the hands of a *bona fide* holder it will bind the firm: *N. Y. Firemen's Ins. Co. v. Bennett*, 13 Id. 109.

KING v. LANE.

[7 MISSOURI, 241.]

THE TIME OF LIMITATION OF AN ACTION UPON A CONTRACT depends upon the law of the place where the action is instituted, and not upon the law of the place of contract.

THE SAVING IN A STATUTE OF LIMITATIONS OF A REMEDY UNTIL THE "RETURN" of the defendant, where the cause of action has arisen abroad, applies as well to foreigners who have never been in the state as to citizens.

APPEAL from St. Louis circuit. The opinion states the case.

By Court, SCOTT, J. William B. King and Ann F. Lane were residents of the state of Virginia, in the year 1825. While still residing there, King executed two bonds to Lane, payable in November, 1826; afterwards, in the year 1834, King left Virginia and became a resident of this state, and some years thereafter died, and the appellant administered on his estate. Ann F. Lane is still a resident of the state of Virginia, and commenced this suit against the appellant in July, 1840. The question arising upon this state of facts is, whether an action of debt on the bonds is barred by our statute of limitations, limiting an action of debt on bonds and promissory notes to ten years.

It is a general and well-established principle of law, that in contracts the time of limitations depends on the law of the country in which the action is brought, and not on the law of the country where the contract is made; or in other words, on the *lex fori*, and not on the *lex loci contractus*. For although contracts are to be construed according to the laws of the country in which they are made, or according to the laws of that country in reference to which they are made, yet the remedy on them must be conformable to the laws of that country in which the remedy is sought. This principle was early recognized in the English jurisprudence.

In the case of *Dupleix v. De Roven*, 2 Vern. 540, a bill was filed for a discovery of assets and satisfaction of a debt contracted in Rome, and the English statute of limitations was pleaded, and the court allowed the plea. In the case of *Stirrhurst v. Graeme*,¹ 2 Bl. 723, and 3 Wilson, 145, the plaintiff was beyond seas in Germany, and had always resided there. Upon a demurrer to this fact set out in a replication to a plea of *non assumpsit, infra sex annos*, the court said, "if the plaintiff is a foreigner, and does not come to England in fifty years, he still hath six years after his coming to England to bring his action;

1. *Stirrhurst v. Graeme*.

and if he never comes to England himself he has always a right of action while he lives abroad, and so have his executors or administrators after his death." In the case of *Williams v. Jones*, 13 East, 439, both plaintiff and defendant resided in India, when the promise on which the action was founded was made, and continued to reside there for more than six years after the making of the promise, and afterwards upon the return of the defendant to England, upon a demurrer to a plea of *non assumpsit, infra sex annos*, the court held that the plaintiff was not barred.

By the common law the plaintiff had an unlimited right of suit, till barred by the statute of limitations. The statute contains exceptions, and if the plaintiff brings himself within those exceptions, there is no statute restraining his right of action. By the word plaintiff in the statute is included as well foreigners as residents; foreigners who are not, and who never have been within the state; and the word defendant also includes foreigners who may contract abroad, and afterwards come into the state. Whether the defendant be resident of the state, and is occasionally absent, or whether he resides altogether out of the state, is not material. If the cause of action arises abroad, it is sufficient to save the statute from running in favor of the party to be charged until he comes within our state. It is not to be inferred that because the statute uses the word "return," that therefore it contemplates only residents, who occasionally go abroad; it was designed to apply to foreigners who always reside out of the state, and who may be found here to be served with process, as well as to residents. In the case of *Ruggles v. Keeler*, 3 Johns. 263 [3 Am. Dec. 482], Judge Kent, in a masterly manner, sustains this construction of the English statute of limitations, which so far as the merits of this case is concerned, is like our own. As to the question, whether this case is to be determined by the act of limitation of 1825 or 1835, it will be remarked, that the eleventh section, article 3 of the act of 1835 says, that if the action accrued before the taking effect of the said act, the statute of 1825 shall give the limitation. This action accrued before the act of 1835, and is consequently subject to the statute of 1825. The application of this statute to the pleadings in this cause will show that errors have been committed by the court below in overruling and sustaining demurrers, and this is an apology for not giving a statement of the pleadings. But as on the record all the facts appear, and as there is no dispute about them, and as upon the whole, judg-

ment has been rendered for the party who was in the right, judgment affirmed.

Judgment will still be rendered for the plaintiff against the appellant, as administrator of William B. King, and the judgment below being against the appellant personally, is reversed, and judgment will be entered in conformity to this opinion, and the appellee will pay the costs.

LEX FORI REGULATES THE TIME OF LIMITATION: *Levy v. Boas*, 23 Am. Dec. 134, and note citing the other cases in this series to the same effect.

THE LEX FORI IS THAT WHICH MUST DETERMINE whether a limitation has attached to a right of action: *Carson v. Hunter*, 46 Mo. 469, citing the principal case.

PROVISION DELAYING THE RUNNING OF THE TIME OF LIMITATION until the return of the defendant, if he be out of the state when the action accrues, prevents the statute from running in favor of a non-resident, who afterwards removes into the state, until such removal: *Tagart v. Indiana*, 15 Mo. 209. The statute of 1845, however, changed this rule, by restricting its operation to cases where the defendant was a resident of the state: *Thomas v. Black*, 22 Id. 332; *Smith v. Newby*, 13 Id. 165.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

BAILEY v. CARLETON.

[12 NEW HAMPSHIRE, 9.]

ADVERSE POSSESSION.—ENTRY UNDER COLOR OF TITLE MUST BE ACCOMPANIED by such acts of ownership, that the reasonable presumption is that the owner, who knew of them, must have understood that a claim adverse to his own is asserted, to constitute adverse possession.

IDEM.—WHERE A DEED CONVEYS TWO TRACTS, to one of which alone the grantor has title, an entry upon and occupation of that tract will not operate a disseisin of the owner from the other.

IDEM.—TO CONSTITUTE ADVERSE POSSESSION there must be an actual possession of some part of the land of the owner against whom the possession is invoked.

USE OF LAND IN COMMON WITH MANY OTHERS, WHO CLAIM NO TITLE THERE TO, there being nothing to distinguish the use of the claimant from that of the others, will not constitute adverse possession, though the acts of user, had they been exclusive in the claimant, might have been sufficient.

WRIT of entry. In 1815 Amos Town conveyed the demanded premises, two lots on the highway, passing through the village of Bath, and also a third lot on the other side of the highway and immediately opposite, to Ebenezer Carleton, defendant's predecessor in interest. At that time Amos Town had title to the tract last mentioned, but not to the demanded premises. Upon receiving his deed Ebenezer Carleton went into possession of the lot opposite the demanded premises, and ever since he or his successors have remained in possession thereof. Plaintiff however contended that his possession of the demanded premises did not originate before 1821, a period of less than twenty years before the institution of this action, which was commenced

in 1837. The defendant on the contrary insisting that the possession began in 1815, and relying as a defense upon a peaceable and uninterrupted possession of twenty years. The evidence as to the possession between 1815 and 1821 is detailed in the opinion. The paper title to the land in controversy was in plaintiff. The jury was instructed that an entry upon and occupation of some portion of each tract was necessary to give a title by possession thereto; that an entry upon any one tract would not extend the possession beyond its limits, and that though possession might be acquired by using a lot as a place of deposit for lumber or farm utensils, yet such possession must be open, visible, and of such a character as to give the owner notice that an adverse claim was asserted. Defendant now moved to set aside the verdict obtained by plaintiff upon the ground of misdirection.

J. L. Carleton and Bell, for the defendants.

Goodall and Bartlett, contra.

PARKER, C. J. The general rule that where a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed, seems to be settled by the current of authorities: *Riley v. Jameson*, 3 N. H. 27 [14 Am. Dec. 325]; *Lund v. Parker*, Id. 49, and cases cited. And such entry may operate as a disseisin of the whole tract; and the possession under it, continued for the term of twenty years, may be deemed an adverse possession, which will bar the entry of the owner after that lapse of time: *Lund v. Parker*, 3 N. H. 49; *Jackson v. Ellis*, 13 Johns. 118; *Jackson v. Smith*, Id. 406; *Jackson v. Newton*, 18 Id. 355.

Exceptions have been suggested to the rule in some cases. One is, where a large tract of land is embraced in the deed, and a small part only has been improved: *Jackson v. Wccdruff*, 1 Cow. 276 [13 Am. Dec. 525]; *Jackson v. Vermilyea*, 6 Id. 677. Another, where the deed under which the claim is made includes a tract greater than is necessary for the purpose of cultivation, or ordinary occupancy: *Jackson v. Oltz*, 8 Wend. 440. These exceptions seem not to be very definite in their application, for lots, like other things, are large or small by comparison, and a tract which would be much too large for cultivation by one, would not suffice for another. But they serve to show the principle upon which the rule is founded. It is, that the entry and possession of the party is notice to the owner of a claim asserted to the land; that the limits of such claim appear from the deed;

and that if the owner for twenty years after such entry, and after notice, by means of the possession, that an adverse claim exists, asserts no rights, he may well be presumed to have made some grant or conveyance, co-extensive with the limits of the claim set up; or that, after such lapse of time, a possession, under such circumstances, ought to be quieted.

There should be something more than the deed itself, and a mere entry under it—something from which a presumption of actual notice may reasonably arise. It is not necessary to show actual knowledge of the deed. Acts of ownership, raising a reasonable presumption that the owner, with knowledge of them, must have understood that there was a claim of title, may be held to be constructive notice, that is, conclusive evidence of notice: *Rogers v. Jones*, 8 N. H. 264. The owner may well be charged with knowledge of what is openly done on his land, and of a character to attract his attention. The presumption of notice arises from the occupation, long continued; and the notice of the claim may well be presumed, as far as the occupation indicates that a claim exists, and the deed, or color of title, serve to define specifically the boundaries of the claim or possession. If the occupation is not of a character to indicate a claim which may be co-extensive with the limits of the deed, then the principle that the party is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation. Thus cutting wood and timber, connected with permanent improvements, may well furnish evidence of notice that the claim of title extends beyond the permanent improvements, and the deed be admitted to define the precise limits of the claim and possession, provided the cutting was of a character to indicate that the claim extended, or might extend, to the lines of the deed. It might, at least, well indicate a claim to the whole of a tract allotted for sale and settlement, of which the party was improving part, unless there was something to limit the presumption. But no presumption of a claim, and of color of title beyond the actual occupation, could arise respecting other lots than that of which the party was in possession. And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation, would be indicated, and of course no notice of any such claim of title should be presumed: *Jackson v. Richards*, 6 Cow. 617; *Sharp v. Brandow*, 15 Wend. 597.

If the possession was not of a character to indicate owner-

ship, and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle: *Poignard v. Smith*, 6 Pick. 172, 176; *Alden v. Gilmore*, 13 Me. 178; *Prop'rs of Kennebeck Purchase v. Springer*, 4 Mass. 415 [3 Am. Dec. 227]; *Hapgood v. Burt*, 4 Vt. 155; *Ewing v. Burnet*, 1 Pet. 41;¹ *Little v. Megquier*, 2 Greenl. 176.

We are of opinion that the rule can not apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right (that is, a title, or prior possession), there is nothing in the nature of it which can give it the character of a disseisin, or possession adverse to the true owner, so as to bind him. For that purpose, there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim.

It is not necessary to settle whether an entry into an inclosed lot, under a deed purporting to convey uninclosed lands adjoining, belonging to the same person, would operate as a disseisin of the latter. Where two separate lots, included in the same deed, belong to different owners, an entry into one can in no way operate as a disseisin in relation to the other. The entry into the house lot, therefore, to which Amos Town, who conveyed, had title, was no disseisin of Solomon Town, who had title to the lot uninclosed, on the other side of the road.

The next question is, what entry into the land itself is sufficient. Here was an entry in 1821, upon the tract in dispute, and a possession, by placing a building on it, by Ebenezer Carleton, the grantor of the defendants. This was, without doubt, an act of ownership. The character of it was adverse to the title of Solomon Town, and it was of a nature to give notice that

1. 11 Peters, 41.

Carleton claimed title to that land. But the possession before that time was of a more ambiguous character.

Ebenezer Carleton, to whom the conveyance was made in 1815, made no entry or use of the lot up to 1821, except by laying lumber upon it, or placing farming utensils there. Those acts by one having a deed, if nothing further was shown, might be held to be a sufficient entry and possession to operate as a disseisin of Solomon Town. But it appeared that so far as the laying of lumber on the lot was concerned, this was no more than Carleton, and divers other persons, had been in the habit of doing before, and that others continued to do the same afterwards. Those acts, prior to 1815, were done by him, and others, without claim of title, and of course in subservience to the title of the true owner. If not acknowledged trespasses, they must have been under a license from Solomon Town. The same acts continued after a deed of other lands, by a person having good title to those lands, could not operate as any notice to the owner of this tract, that a deed had been made covering his land also, and that there was an occupation under that deed, or under any claim of right to occupy adversely to him. The additional act of leaving farming tools on the land does not seem to change the character of the possession. It was not, therefore, until 1821, when the building was removed on to the land, that any entry was made upon it by Carleton, from which Solomon Town, with knowledge of the entry, should have understood that Carleton made any claim to the ownership of the lot; and until that time, therefore, there was nothing from which an ouster can be inferred, and no possession by him that can be deemed adverse, except at the election of the owner: *Magoun v. Lapham*, 21 Pick. 140; *Thomas v. Patten*, 13 Me. 836.

Judgment for the plaintiff.

Woods, J., having been of counsel, did not sit.

ADVERSE POSSESSION IN WHAT CONSISTS: See *Sumner v. Murphy*, 27 Am. Dec. 397; *Smith v. Hosmer*, 28 Id. 354, and note.

GALE v. TAPPAN.

[12 NEW HAMPSHIRE, 145.]

EVIDENCE OF IDENTITY OF A PERSON UPON WHOM DEMAND OF PAYMENT has been made with the maker of a note is sufficient, if it appear that a demand was made at the latter's office upon a person who acknowledged his signature to the note, appeared familiar with the transaction, and

placed his refusal to pay upon the ground that there had been trouble about the note; though the party presenting, not knowing the maker, is unable to testify positively that the demand was made upon him.

POWER OF ATTORNEY TO COLLECT A DEBT IS REVOKED BY DEATH of the principal.

ESTOPPEL.—ACKNOWLEDGMENT OF SUFFICIENCY OF AUTHORITY OF AN AGENT to make a demand does not estop the party from afterwards showing that the authority was revoked, when the demand was made, by the death of the principal.

ASSUMPSIT by the executors of Hannah Tappan, upon a promissory note, payable on demand at defendant's office, executed by defendant. The demand relied upon was made by one Eaton in 1839. Eaton's authority was derived under a power of attorney, executed by plaintiff's testator, but it was contended, on the part of defendant, that this authority had been revoked prior to its exercise, by the death of Hannah Tappan, which occurred in 1838. Defendant also claimed that there was no sufficient evidence that a demand had been made upon him. On this point Eaton testified that he did not know defendant, and therefore could not testify positively that the demand was made upon him, but the demand was made upon a person that he found in defendant's office, and that person did not deny his signature to the note, and placed his refusal to pay upon the ground that there had been trouble about the note. A verdict was taken for plaintiffs, subject to the opinion of the court on the above case.

James Bell, for the plaintiff.

Bartlett, contra.

GILCHRIST, J. The first objection taken by the defendant can not be sustained. There is nothing in the case to raise a presumption that the demand was made upon any other person than Tappan, the defendant. The person called upon appeared to be familiar with the transaction, did not deny his signature to the note, and said that there had been trouble about it. He was also found at the defendant's office; and not only is the evidence competent to be submitted to the jury to prove a demand upon the defendant, but it is difficult to resist the conclusion that the defendant was the person upon whom the demand was made. The other objection, however, is fatal to the maintenance of this suit. The demand was made by Eaton, not in pursuance of any authority, written or verbal, from the executors, but under the power of attorney from Hannah Tappan. He showed his authority to the defendant, who said he was satisfied as to the

power of attorney. He might be satisfied that it was executed by Mrs. Tappan, and that, upon its face, it sufficiently authorized Eaton to make the demand; but this does not now estop him from taking the objection, that the authority was then determined by the death of the principal. He might not then have known of her death; or he might have supposed that the demand was made as well under an authority derived from the plaintiffs, her executors, as under the power of attorney.

It has been often settled that an authority of this kind is determined by the death of the principal. Where a man makes a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed, the death of the feoffer is, in law, a countermand of the letter of attorney: Co. Litt. 52 b. An authority confirmed by letter of attorney must be executed during the life of the principal; for a power to represent another can only continue so long as there is some one to be represented: Bac. Abr., Authority, E. A payment of the wages of a sailor to a person having a power of attorney to receive them, has been held void, where the principal was dead at the time of the payment: *Wallace, Adm'r, v. Cook*, 5 Esp. 118. And a power of attorney, authorizing the sale of a vessel, is revoked by the death of the owner: *Wallace et ux., Adm'x, v. King*,¹ 1 Stark. 121. And the same point seems to have been determined in a case in equity, where a power to a creditor to receive a debt, expressly for the purpose of liquidating the claims of the creditor, unaccompanied, however, by any actual assignment of the debt, or by any security to which the power might have been ancillary, was held to be revoked by the death of the principal: *Lepard v. Vernon*, 2 Ves. & B. 51. To the same point, also, are the cases of *Harper et al. v. Little*, 2 Greenl. 14 [11 Am. Dec. 25]; *Rex v. Corporation of the Bedford Level*, 3 East, 356;² and *Raw v. Alderson*, 7 Taunt. 453. As the authority of Eaton, therefore, was determined by the death of Mrs. Tappan, before the demand was made upon the defendant, the verdict must be set aside, and a

New trial granted.

AGENT'S AUTHORITY IS REVOKED BY DEATH OF PRINCIPAL, if not coupled with an interest: *Staples v. Bradbury*, 23 Am. Dec. 494; *Jenkins v. Atkins*, 34 Id. 648.

1. *Watson v. King*.

2. 6 East, 356.

STATE v. DIMICK.

[12 NEW HAMPSHIRE, 194.]

THE STATE MAY RESERVE THE RIGHT TO EXECUTE AND SERVE PROCESS in any territory which she may cede to the United States.

A STATE COURT MAY ON HABEAS CORPUS inquire into the validity of any detention of liberty which it is attempted to justify under pretense of authority derived from the United States. Thus it may pass upon the validity of an enlistment, and its sufficiency to justify the detention of a petitioner as a soldier.

STATUTE PROVISION THAT AN INFANT SHALL NOT BE ENLISTED without the consent of his parent or guardian is for the benefit of the infant; and if it is not complied with he may waive the irregularity and ratify the enlistment upon becoming of age.

DISSSENT OF AN INFANT FROM A CONTRACT OF ENLISTMENT must be expressed within a reasonable time after he comes of age, or it will be treated as ratified. The assent can not be postponed for more than a year in the absence of any special features.

HABEAS CORPUS on the petition of Nathan Murray, complaining that he is detained of his liberty by defendant, a captain in the United States army, by virtue of an enlistment, which petitioner insists is void, because entered into by him while yet an infant without the consent of either parent or guardian. The writ was served upon defendant in Fort Constitution. The opinion states all the other facts.

Odell, for the respondent.

Emery, *contra*.

PARKER, C. J. The objection, that this court has no jurisdiction to send process into that portion of territory, lying within the limits of this state, ceded by the state to the United States, and occupied for a fort and light-house, can not be supported. The act, by which the United States hold it, vests in that government the land, with the fort and light-house thereon, with all the jurisdiction thereof which is not reserved by the act. One proviso in the act of cession is, "that all writs, warrants, executions, and all other processes of every kind, both civil and criminal, issuing under the authority of this state, or any officer thereof, may be served and executed on any part of said land, or in said fort," etc. There is nothing in this proviso repugnant to the grant. The transfer of the title to the land does not oust the jurisdiction of the state, which may well extend over lands owned by the United States. The jurisdiction granted to the United States is not a general grant, but all which is not reserved by the act. If, as has been suggested, the United States

could not receive the cession with the reservation, they could not by it take what is not granted. The jurisdiction to issue and execute all writs, and other legal process there, includes the writ of *habeas corpus*: *Ex parte Carlton*, 7 Cow. 471. Nor can the objection be maintained, that this is a case arising under the laws of the United States, of which the courts of that government have exclusive jurisdiction.

If the laws of the United States justify the detention of the applicant, there is nothing illegal. If they do not, it is not a case arising under the laws of the United States, although it may be under color or pretense of authority by virtue of those laws. But a mere pretense of authority under the laws of the United States, is no better than any other pretense. It neither confers an exclusive jurisdiction on the courts of the United States, nor ousts the ordinary jurisdiction of the courts of the state. Nor can it make any difference that the illegal imprisonment, if there be one, is by an officer of the United States army. The courts of the United States have no exclusive jurisdiction over those officers: *Carlton, Matter of*, 7 Cow. 471; *Commonwealth v. Harrison*, 11 Mass. 63; *Commonwealth v. Cushing*, Id. 67 [6 Am. Dec. 156].

The petition alleges that the petitioner, at the time of his enlistment, was under twenty years of age, and that the enlistment was without the consent of his parents. The evidence supports these allegations, and they are not controverted in the return. The act of congress of January 20, 1813, provides that no person under the age of twenty-one years shall be enlisted, or held in service, without the consent, in writing, of his parent, guardian, or master, if any he have, and that the officer enlisting any person, contrary to the true intent and meaning of the act, shall forfeit and pay the amount of the bounty and clothing he may have received: 2 U. S. Laws, Story's ed., 1285. The petitioner might have been discharged, if an application had been made immediately after his enlistment; and no neglect of the parent to make an application could be construed into a ratification of the enlistment, because it could not furnish a written evidence of assent. But the petitioner's evidence shows that he became of full age in August, 1840, more than a year before this application was made; and the return alleges that, having enlisted for five years, he has continued to perform service as a soldier, and has received his pay up to the last of October, 1841; and the question arises whether he is now entitled to a discharge,

under these circumstances, or whether he has not himself ratified the enlistment, so that he is now well held under it.

It has been argued that the enlistment was entirely void, and incapable of ratification, but we do not think it a matter of that description. It is a contract for service, for the stipulated pay and rations: *United States v. Bainbridge*, 1 Mason, 82; 11 Mass. 71.¹ The statute provides that it shall not bind the infant, or those who have the control of him, if made without their assent, and subjects the officer to the loss of the bounty and clothing the minor may have received.

There is a class of cases where the law having imposed a penalty for the doing of a particular act, the act itself is prohibited by implication, and illegal; and any contract involving the performance of such act is held to be illegal and void: *Roby v. West*, 4 N. H. 285 [17 Am. Dec. 423]; *Pray v. Burbank*, 10 Id. 377. These cases are founded on considerations of public morals, the enforcement of municipal regulations, or the prevention of fraud; and a subsequent ratification of the contract would, ordinarily, be as much a violation of the policy which induced the imposition of the penalty, as the making of the original contract itself. They are not intended as regulations for a time, or to furnish protection for a certain period, merely.

This case is not of that class. There is no question here, whether the penalty upon the officer, if it may be properly so termed, prohibits, by implication, the act of enlistment. The statute is express, that no person under the age of twenty-one shall be enlisted, or held to serve, etc. But this is for the benefit of the minor, or the party having the control of him, and may be waived by those interested. There is no reason why the infant may not ratify the enlistment, after the time arrives when he may lawfully enlist. Like other contracts of infants, it is voidable: 11 Mass. 71. If the father of the petitioner, subsequent to the enlistment, had given his assent, in writing, the maxim, "*omnis ratihabitio retro trahitur*," would seem well to apply. The provision, subjecting the officer to the loss of the bounty and clothing, was merely intended to protect the government from loss where the contract was avoided. We are of opinion, therefore, that the contract of enlistment was one which the infant might ratify on his coming of age, so as to bind himself; and that this might be done by his acts, in the same manner that he might ratify other contracts. And we are further of opinion, that remaining in the service for more than a year

1. *Commonwealth v. Cushing*.

after he became of age, without dissent, receiving his pay and rations, is a ratification of the contract. It was not a matter that he could continue so long as he pleased, with power, on his part, to disaffirm it when it no longer suited him. He had a reasonable time after he arrived at full age to express his dissent and apply for a discharge. His reasons for not doing so are not sufficient. It does not appear that he was told it was necessary that any one should apply for him—that he was in any way deceived, or restrained, so that he could not apply—or that he manifested any repugnance to the service. He received his pay from time to time. Continuing in the service of an employer, under any other contract for service, for such a period of time after his arrival at full age, taking the stipulated compensation, in the absence of fraud, duress, or other good reason for a neglect to dissent, must be deemed a ratification of the contract; and this being a contract, capable of ratification, falls within the general principle. If he had been restrained, or on foreign service, or deceit had been practiced upon him, the case would be different.

AUTHORITY OF STATE COURT ON HABEAS CORPUS.—The doctrine of the principal case upon this matter is not now the law. The supreme court of the United States, necessarily the final arbiter upon questions of this kind, has denied the jurisdiction of the state courts in like cases in *Ex parte Tarble*, 13 Wall. 397; *United States v. Booth*, *Ableman v. Booth*, 21 How. 506.

The facts in the Booth cases, so far as necessary to be detailed, were these: Booth was charged with an offense against the fugitive slave law, and was held to answer by the commissioner of the United States before whom he was examined. While in the custody of the marshal, pursuant to the commitment of the commissioner, a writ of *habeas corpus* was sued out by him, returnable before a justice of the supreme court of Wisconsin. The proceedings under the writ were finally removed into the supreme court, and it was there decided that the imprisonment was unauthorized, as the fugitive slave law was unconstitutional. The marshal was directed to release the prisoner. Ableman, the marshal, then sued out a writ of error, by virtue of which the record was removed into the supreme court of the United States. Subsequently an indictment was found against Booth in the district court of the United States for the same offense, and upon his trial he was convicted and condemned in fine and imprisonment. While in the custody of the sheriff, into whose keeping he had been delivered by the marshal, Booth sued out another writ of *habeas corpus*, returnable before the supreme court of the state, in which he complained of his detention as unauthorized because of the unconstitutionality of the fugitive slave law. Upon the return of the writ, the supreme court of Wisconsin, constituting itself a tribunal supervisory to the district court of the United States, declared the detention unauthorized, because of such unconstitutionality: *In re Booth*, 3 Wis. 157. That court indeed went a step further, for it attempted to make its decision final by directing its clerk to make no return to the writ of error to the supreme court of the United States, sued out in behalf of the United States, and which was

allowed by the chief justice of the latter court. To meet the difficulty occasioned by the failure of the clerk to make a return, the attorney-general of the United States obtained leave to file the certified copy of the record of the supreme court of Wisconsin, which he had produced on his application for a writ of error, to have the same force and effect as if returned by the clerk with the writ of error. This case is the one reported as *United States v. Booth*, and was decided at the same time as the preceding one of *Ableman v. Booth*. The judgment of the supreme court of Wisconsin was reversed in each case. The court say: "If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgments of the courts of the state in which the party happens to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and consequently their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes from the highest to the lowest, including felonies which are punished with death, as well as misdemeanors which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished in one state, would be regarded as innocent, and indeed as praiseworthy in another.

"It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is of itself a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

"The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government, and although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division

was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union for an offense against the laws of the state in which he was imprisoned." The court thought it was immaterial whether the fugitive slave law was unconstitutional or not.

This case, it will be seen, decides that no person detained by virtue of process issued from a federal court can be released by a state court; but *Ex parte Tarble*, 13 Wall. 397, went further. That case was one in error to the supreme court of Wisconsin, which had discharged a soldier detained by a recruiting officer upon *habeas corpus*, upon the ground that the soldier was a minor, under the age of eighteen years, who had enlisted without the consent of his father or guardian. The case was then precisely similar to the principal case. The supreme court of the United States held that the questions presented were conclusively settled in the Booth cases. The court say: "Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals or by what officers; and how much discretion, or whether any at all, shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

"Now among the powers assigned to the national government, is the power 'to raise and support armies' and the power 'to provide for the government of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state of authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned; and it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, or government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy this branch of the public service." The conclusion was reached that if from the petition for the writ it appeared that the detention was justified under the authority or claim and color of the authority of the United States, the writ should be denied; and that if this did not appear, then the duty of the officer in whose custody the prisoner was, was to make a return "sufficient in its detail of facts, to show distinctly that the imprisonment is under the authority or claim and color of the authority of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority or claim and color of the authority of the United States, and not under the mere pretense of having such authority." Upon such a return it would become the duty of the state court to desist from any further proceedings. It would further be the duty

of the officer in whose custody the prisoner was, if any such further proceedings were attempted by the state courts to resist them, or any interference with his prisoner, and to call to his assistance any force that might be necessary for that purpose: *Ableman v. Booth*, 21 How. 524. Resort, therefore, for relief, whenever the imprisonment complained of is under color of authority derived from the United States, must be had to the federal courts.

The condition in which the decisions of the state courts had left this question prior to the decision of the Booth cases, is summed up in Hurd on *habeas corpus*, page 166, as follows: "It may be considered settled, that state courts may grant the writ in all cases of illegal confinement under the authority of the United States. And the weight of authority clearly is that they may decide as to the legality of the imprisonment; and discharge the prisoner if his detention be illegal, though the determination may involve questions of the constitutionality of acts of congress, or of the jurisdiction of a court of the United States." See also *Ex parte Lockington*, Brightley, 269; *Commonwealth v. Fox*, 7 Pa. St. 336; *State v. Brearley*, 2 South. 555; *Commonwealth v. Harrison*, 11 Mass. 63; *Commonwealth v. Cushing*, Id. 67; *Commonwealth v. Downes*, 24 Pick. 227; *Sims' case*, 7 Cush. 285. Of course after the decisions in the Booth cases, the state courts recognized that a writ of *habeas corpus* could not be used to release a prisoner held by virtue of process issued from a court of the United States: *Ex parte Hill*, 5 Nev. 154; *Ex parte Le Bur*, 49 Cal. 160; *Ex parte Holman*, 28 Iowa, 89. But it was not everywhere considered, that a person held under military authority could not be released by means of this process: See *People v. Gaul*, 44 Barb. 98; *In the Matter of Martin*, 45 Id. 142; *Ex parte Anderson*, 16 Iowa, 595; *McConologue's case*, 107 Mass. 160; *Disinger's case*, 12 Ohio St. 256. Other of the state courts, however, denied themselves possessed even of such a jurisdiction: *Ex parte Hopson*, 40 Barb. 34; *Ex parte O'Connor*, 48 Id. 59; *State v. Zulick*, 5 Dutch. 409; *Ex parte Spangler*, 11 Mich. 298. The law must now, of course, be considered definitively settled in accordance with this latter view.

DESPATCH LINE OF PACKETS v. BELLAMY MANUFACTURING COMPANY.

[12 NEW HAMPSHIRE, 205.]

ACTS OF A DIRECTOR OF A CORPORATION ARE VALID so far as the interests of third persons are concerned, though he is not possessed of the qualifications required by the by-laws of the corporation, if his election appear of record and he has been permitted by the corporation to act as director.

MAJORITY OF THE DIRECTORS OF A CORPORATION may exercise the powers conferred upon their body by the by-laws of the corporation; but this they can only do after there has been a joint consultation at which all the directors were present, or after there has been a regular meeting at which all might have been present, and at which a majority did meet and act.

ACT PURPORTING TO BE THE ACT OF THE BOARD OF DIRECTORS of a corporation is presumed to have been properly executed, but the presumption may be rebutted.

AUTHORITY OF AN AGENT TO CARRY ON THE BUSINESS OF A MANUFACTURING COMPANY does not extend to the right to pledge or mortgage its machinery and buildings.

NOTE EXECUTED BY AN AGENT OF A CORPORATION in his own name and signed "A. B., Ag't etc.," is the note of the corporation, if it was intended as such, and the authority of the agent extended to the execution of notes.

AUTHORITY TO CONVEY THE REAL ESTATE OF A CORPORATION MAY BE CONFERRED BY VOTE of the board through whom its business is transacted.

RATIFICATION OF AN ACT IS EQUIVALENT to a precedent authority.

RATIFICATION OF AN ACT MUST BE IN THE PARTICULAR MODE or form necessary to confer an authority to perform it, in the first instance.

THE RULE WITH REGARD TO FIXTURES THAT APPLIES BETWEEN HEIR AND EXECUTOR also applies between vendee and vendor, and mortgagee and mortgagor.

FIXTURES, MACHINES AND OTHER ARTICLES ESSENTIAL to the occupation of a building or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of its character and pass with a conveyance of the land.

FIXTURE, WHEN CONSTRUCTIVELY ANNEXED.—A steam-engine which is used in a building in process of manufacture, and which can not be removed therefrom without tearing down a portion of the building to afford it egress, is constructively annexed thereto so as to become a fixture, though it is not fastened in any way.

LOOSE MOVABLE MACHINERY NOT AFFIXED TO THE BUILDING in which it is situate and which may be removed without any damage to the building, is not a fixture though it is used in the prosecution of a business to which the building is devoted.

A MORTGAGE OF PERSONAL PROPERTY need not be by sealed instrument.

AN INSTRUMENT UNDER SEAL EXECUTED BY AN AGENT which might operate as a writing without seal, will be so treated if necessary to give it validity because of a lack of authority upon the part of the agent to bind his principal by deed.

ACCEPTING BENEFITS ARISING FROM A CONTRACT OF AN UNAUTHORIZED AGENT, ratifies the contract if it is one capable of ratification by parol. Thus receiving and retaining the consideration of an unauthorized mortgage of personal estate, ratifies it.

TAKING OF GOODS BY A WRONG-DOER FROM A TRUSTEE ON ATTACHMENT PROCESS, does not discharge the latter, but furnishes a reason for delaying proceedings, until damages for the taking can be recovered.

TRESPASSER IN POSSESSION OF ANOTHER'S GOODS can not be charged as trustee of the owner.

FOREIGN attachment, in which the Savings Bank of Strafford county is sought to be charged as trustee. The case was submitted to this court, upon the facts proved on the trial. The facts not appearing in the opinion were as follows: On the thirteenth of January, 1837, Robert H. Palmer, general agent of the Bellamy manufacturing company, executed and delivered to the savings bank the following note: "For value received I

promise to pay the savings bank for the county of Strafford or order, three thousand dollars in six months. Robert H. Palmer, agent Bellamy manufacturing company." At the same time and to secure payment of the note, he executed in the name of the company a mortgage of the premises on which were situated their buildings, and of all the fixtures, machinery, tools, and materials to be found on the premises. This mortgage purported to be authorized by a vote of the board of directors of the company, of the same date. But this vote was the act of only two of the directors, and was at a meeting of which no previous notice had been given the third director; moreover, Emery, one of the two directors who did act, was not a proprietor in the company. In November, 1837, which was after it had been served with process in this action, the savings bank took possession for the first time of the mortgaged property. The material then on the premises which might be classed as either fixtures, machinery, or tools consisted in part as follows: One steam-engine, situate in the building, not attached thereto in any way, but which could not be removed without tearing down a part of the building to afford it a passage; certain steam-boilers set in brick, which furnished steam for the engine last mentioned, whose removal must necessitate the tearing down of the brickwork; two copper boilers or kettles in the same situation; one cullender; one padding machine, and one calico printing machine, not attached to the building, and which could be removed without any damage; one pressing machine, let into the floor and attached to the ceiling by braces, the removal whereof would necessitate the taking up of the flooring and the drawing of the nails by which the braces were fastened to the ceiling. Some hollow copper rollers, adapted to printing and intended for use on iron mandrils, and which might be removed without injury, and used with any other mandrils of the same size; one steam-boiler not set, lying without the buildings of the company; a lot of jointed cast-iron pipe connecting the engine with the boilers supplying it with steam, and which passed through a partition in the building, but which might be unscrewed and removed; buckets, pails, etc. The steam-boiler not set, and the copper rollers mentioned above, were afterwards taken from the possession of the agent of the savings bank on the premises, upon an attachment thereof, as the property of the Bellamy manufacturing company, and were ultimately sold on execution. The bank thereupon began an action against the sheriff for the taking, which action is now dependent.

Christie, for the plaintiffs.

James Bell, contra.

PARKER, C. J. The first question we have considered, is, whether Emery was a director, so that his act, as such, could have any validity. He appears to have been elected an associate of the company, and at the same meeting when the by-laws were adopted, to have been chosen a director. It was suggested that his election was under the first article of the by-laws, which made a temporary provision until the annual meeting in 1837, and that this article did not require that the person elected should be a proprietor; but this position is questionable, and the consideration of it may be waived. The second article of the by-laws, that any person chosen a director should cease to be one when he ceased to be a proprietor, if construed according to its precise language would not prohibit the election of a person who was not a proprietor; and it might possibly have been intended not to debar the corporation from electing one who owned no stock, but only to terminate the official character of any one who, having been elected and trusted because he was a proprietor, no longer had the interest in the success of the company which formed the inducement to elect him. But this was not probably the construction intended. There is nothing in the proceedings of the company to show that we ought to give this clause such a strict interpretation, and it may be well construed to render any one who was not a proprietor ineligible. Such seems to be the fair implication. The fact that Mr. Emery was elected to the office does not militate against this construction; for although he was never an owner, his election was very probably made under an anticipation that he would qualify himself for the office by a purchase of stock.

But this construction of the by-law does not alter the case. He was elected a director, and his election made matter of record; and he acted as such when the vote, out of which the mortgage to the trustees arose, was entered in the book provided for that purpose. If this election had been by a municipal corporation, coming into office under color of an election, he would have been an officer *de facto*, and his acts valid so far as third persons had an interest in them. And the regularity of the election could not in such case be inquired into, except in some proceeding to which he was a party: *Tucker v. Aiken*, 7 N. H. 131, 135, and cases cited. As a director of a private corporation, although called, in common parlance, an officer of the corpora-

tion, he is, perhaps, not technically to be considered an officer *de facto*. He is one of the agents elected by a vote of the corporation, for the management of its affairs, or some of them. But a similar rule must prevail in relation to the effect of his acts, so far as the corporation have held him out as an agent, and third persons have confided in his acts, done within the scope of the authority he appeared to possess. By electing him a director, and permitting him to act as such, the corporation held him out to the world as a director—as one of their agents, having all the powers of an agent of that description, and to be trusted as such. And it was only necessary, under such circumstances, for those who dealt with the corporation through him, to inquire what powers directors had, and what acts the corporation had authorized them to do. They were not required to investigate the qualifications which the corporation had prescribed to itself, as the condition upon which any one should be elected, or permitted to act. The corporation, when Emery was elected, had the means of knowledge whether he was qualified according to their by-laws. On the conjecture that he was expected to take stock, and that the election was made in anticipation of that, he might have been required forthwith to become a stockholder, before his acceptance, or the corporation might have proceeded to another election. Instead of this, they left his election as a director upon the record, as if he was duly eligible, and thus held him out, and permitted him to hold himself out, as a director; and he so acted. It is a settled rule, that a person is bound by the acts of another, whom he has held out to the world as his agent for that purpose: *Davis v. Lane*, 10 N. H. 156; *Beard v. Kirk*, 11 Id. 397.

Here, however, another question arises. Ira Haselton was a director duly elected. Without considering whether the president was *ex officio* a director, as well as presiding officer of the board—and without inquiring into the particular effect of the provision in the second article of the by-laws, that the directors should jointly manage the affairs of the corporation—it is sufficient to say that there were three directors, and only two of them were present, and authorized this mortgage to the trustees.

The vote, authorizing the mortgage, purports to have been passed at a meeting of the directors; and it might, nothing appearing to the contrary, well be presumed that it was passed by all, or had the concurrence of the requisite number to render it valid. And it might not be sufficient to rebut this presumption,

to show that the assent of the several directors was procured without any meeting, or consultation, each giving his assent at a different time and place; although this is not perfectly clear. There are safeguards in consultation, and considerations of policy, as well as of construction, which, in the absence of special authority authorizing a different course, furnish an argument in favor of the position, that an authority to two or more officers or agents of a corporation, in their discretion, to do certain acts, is not well executed by the assent of all, if given separately to the acts. On the other hand, if all concur in assenting to or directing the act, it may be said, with much force, that all is done which the constituent required, where there is no express restriction rendering the presence of the whole number, together, necessary, in order to the validity of any act done. But it is not important to discuss this further, at this time. However this may be, all presumption that the vote authorizing this mortgage had the concurrence of all the directors, is expressly negatived by the evidence in the case; from which it appears that Ira Haselton never joined in it, or in any way assented to it, and that he was not even consulted on the subject before the mortgage was made. Taking the most favorable view of the matter, the vote was the act of two out of three directors, without any consultation with the third, or any concurrence on his part; and is this sufficient to bind the corporation and render the mortgage valid?

It has been held that where the directors of a corporation have power to bind it by their contracts, that power may be exercised by a majority: *Cram v. The Bangor House Proprietary*, 3 Fairf. 354. And this is cited as an authority in point, in this case. But it by no means settles the question now presented. It did not appear in that case, that all the directors were not present; or if they were not, that they had not been notified, and had an opportunity to be present; which, appearing here, constitutes a marked difference between the two cases.

Where is the authority to be found, in this case, for two of the directors to do this act, without the knowledge of the other? The sixth article of the by-laws provides, that "the directors shall have power" (after other matters specified), "to exercise the general superintendence and control over the affairs of the company, and to appoint an agent or agents, and such other officers for carrying on the business of the company," etc., "as they may determine." The second article gave them, jointly, similar powers. This is a very general authority, suffi-

cient to authorize them to borrow money and execute a mortgage. But this power is given to the directors—not in terms even, to a majority of them. There was here no vote of the corporation giving them any special power to execute the mortgage, or to authorize it to be done. The mode in which the directors might act depends, therefore, upon the principles applicable to by-laws which confer powers upon the directors generally. The general principle in relation to agencies is, that where an authority is given to two or more persons to do a private act, the act is valid, to bind the principal, only when all of them concur in doing it: *Story on Agency*, 44; *Andover v. Grafton*, 7 N. H. 304, and authorities cited. Where the authority is to do an act of a public nature, if all meet for the purpose of executing it, a majority may decide: *Grindley v. Barker*, 1 Bos. & Pul. 229; Co. Litt. 181 b; *Case of the Baltimore Turnpikes*, 5 Binn. 481; *The King v. Whitaker*, 9 Barn. & Cress. 648.

The duties of officers, so called, of corporations, where those duties are prescribed by the corporation itself, are in the nature of an agency, but such officers or agents, appointed not to do single acts, but for regular terms, and having by the by-laws a general or very extensive authority in the management of the concerns of the corporation, it is believed have not in practice been supposed to come within either of the above rules. And it might not only be inconsistent with the general usage upon the subject, but operate to impose unnecessary restrictions upon such bodies, to apply a rule requiring in all cases the assent, or even the presence, of all the directors, or agents of any other class, deriving from the by-laws regular powers. Had the authority of the directors, to manage and exercise a general superintendence and control over the affairs of the company, been conferred by the charter itself, it would have been in the nature of an original corporate power in a definite number, and a majority of the whole number being duly assembled, at a regular meeting, might act by the major vote of those present: *The King v. Miller*, 6 T. R. 278; *The King v. Bellringer*, 4 Id. 823; *Rex v. Varlo*, Cowp. 250; 1 Bos. & Pul. 236;¹ *Ex parte Willcocks*, 7 Cow. 409, and note, 410. Does it make any difference, in this respect, that the power is found in the by-laws, instead of being conferred directly by the charter? The principle has been applied in other cases than those of public corporations: *Blackett v. Blizzard*, 9 Barn. & Cress. 851.

The directors of corporations generally, whose usages have

1. *Grindley v. Barker*.

been such as to deserve notice (although no evidence of usage is found in this case), are supposed to have had stated or notified meetings, at which a majority undertook to transact the business confided to the board; and to hold that the act of the majority in such cases was invalid, might shake titles, or cause other inconveniences to a serious extent. And we are of opinion, that where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation, without special limitation as to the manner, a majority may act, within the scope of the authority given to the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority; or where there is a regular meeting, at which all might be present, and a majority actually meet, and act by a major vote: *Savings Bank v. Davis*, 8 Conn. 191. And when the act purports to be the act of the board, it may be presumed that it was the act of a majority, until the contrary is shown. We are not aware of any well-settled principle, or usage, which will carry us further than this. The cases which hold that a majority of a definite body being assembled, a major part of those assembled may act, presuppose a regular meeting, or one on notice. We consider the decision in Maine in concurrence with these principles, as far as it extends on the facts in that case.

But this presumption just adverted to, may be rebutted, and is so in this case. Here was no assent of all the directors at any meeting, or even obtained separately, if that might be held sufficient. Nor were there a meeting and consultation of the whole board, and the vote of a majority, authorizing the act to be done. Nor was there a meeting regularly notified, or held at some regular period, at which, all not appearing, a majority assembled, and acted by a major vote. There is nothing to show that Ira Haselton had any opportunity to act; and the attempt, therefore, to show a pre-existing authority to give this mortgage, by means of the vote of the directors, must fail, if the corporation were contesting the matter on the evidence before us.

In this view, it is not necessary to consider another question which has suggested itself, and that is, whether the directors, in case all had assembled, could have conferred authority upon one of their body, or any other person, as agent, to make the mortgage; or whether it must, in order to its validity, through the acts of the directors, as such, have been executed by at least a majority of the board of directors. The general principle is, that one who has a bare power to do an act, must execute it him-

self, and can not delegate his authority to another—that the authority is exclusively personal, unless from the express language used, or from the fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent: Story on Agency, 14, 16; 7 N. H. 304.¹ If this had been material, it might have deserved consideration whether the power given to the directors, to appoint agents for carrying on the business of the company, were not sufficient of itself to authorize the delegation in this case, or whether that were to be confined to the ordinary business of the corporation: 8 Conn. 201, 207;² 12 Mass. 522.³

The evidence failing to establish the validity of the mortgage to the trustees, through the vote of the directors appended to it, other questions present themselves on the case before us.

It has been contended that Palmer, as general agent of the company, had power to borrow money, and to pledge the machinery, to secure the loan, without vote. This was not a pledge. No possession appears to have been given, or intended to have been given, at the time. But if it had been, there is nothing in the by-laws, or in the nature of the agency, nor anything in the authorities cited, which can sustain the right to pledge the machinery, even if that of borrowing money may be inferred. *Stow v. Wyse*, 7 Conn. 219 [18 Am. Dec. 99], contains a strong implication to the contrary. The by-laws provide that the directors may appoint an agent, or agents, for carrying on the business of the company. But it is not carrying on the business of the company to pledge or mortgage the machinery used by the company, and thereby suspend its operations, or place them at the will and pleasure of a mortgagee: *Ang. & Ames on Corp.* 172, and cases cited; *Life and Fire Ins. Co. v. The Mechanics' Fire Ins. Co.*, 7 Wend. 33. Circumstances might be such, possibly, as to show an authority to pledge the manufactured goods, which he was authorized to dispose of, but that is not this case.

The note to the savings bank is carelessly drawn; but there is sufficient on its face to show that it was intended to be the note of the Bellamy manufacturing company, and it might well subsist as such, if Palmer had authority to execute it: See 2 Stark. on Ev. 477, n. 1; *Wilks v. Back*, 2 East, 142; *Montgomery v. Dorion*, 7 N. H. 484; *Pentz v. Stanton*, 10 Wend. 271 [25 Am. Dec. 558]; *Savage v. Rix*, 9 N. H. 263; *Evans v. Wells*, 2 Wend.

1. *Andover v. Grafton*.

2. *Savings Bank of N. H. v. Davis*.

3. *Stoughton v. Baker*, 4 Mass. 522.

325.¹ There is no form prescribed in which such an instrument shall be made; and it is immaterial whether the name of the principal or agent be placed first, if the authority exist, and the intention be apparent. There can be no good reason why Palmer should have added, "Ag't Bellamy Man. Co." to the signature, if he intended to make a personal contract. It may be held to be the note of Palmer, if there were no authority and no ratification of the act. But a ratification will exonerate him from liability: Story on Agency, 246.

The mortgage which he executed at the same time, and which was part of the same transaction, and describes the note as the note of the company, is formal to convey as well real as personal estate. It purports to contain a conveyance, and covenants of the company, and to be executed by the company, and that the corporate seal is affixed. The signature and acknowledgment are that of the company, made by Palmer as agent. Being in form, the deed of the company, executed by one who who assumed to act as their agent, it is susceptible of ratification; and the next question is, whether it has ever been ratified, and if so, to what extent. This includes the consideration of what is necessary to a ratification.

There has been some diversity of opinion upon the subject whether a corporation, or the directors of a corporation, can constitute an agent for the conveyance of real estate except by a power under the corporate seal: 8 Conn. 192.² In the case of an individual, whenever any act of agency is required to be done, in the name of the principal, under seal, the authority to do the act must be conferred by an instrument under seal: *Montgomery v. Dorion*, 6 N. H. 250; Story on Agency, 50.

There seems to be no doubt that, according to the rule of law as held in England, a corporation can not convey, nor mortgage, but under the corporate seal: 4 Kent's Com. 443 and authorities cited; 8 Conn. 191. But a different rule has prevailed to some extent in this state, so far at least as regards conveyances by towns, and the proprietors of common and undivided lands: *Cofran v. Cockran*, 5 N. H. 458; *Copp v. Neal*, 7 Id. 275; *Atkinson v. Bemis*, 11 Id. 44; *Coburn v. Ellenwood*, 4 Id. 102. In this latter case, Chief Justice Richardson said: "It is not now to be doubted that the proprietors of common and undivided lands are corporations, or that they can by vote authorize agents to make conveyances in their name, or that

1. 22 Wend. 325.

2. *Savings Bank of N. H. v. Davis*.

deeds properly executed by such agents may be valid to pass the estate."

And the weight of authority in this country seems to be in favor of the position, that private corporations, or boards of directors through which their business is transacted, may appoint an agent for the conveyance of real estate, by vote, without a power or instrument under the corporate seal: Ang. & Ames on Corp. 114, 154; 8 Conn. 192, 202, and authorities cited. If the formality of an instrument under seal, conferring the power upon the agent who is to make the conveyance, should be required, it would add nothing to the authenticity of the conveyance, if the individual who affixes the seal to the power derive his authority from a mere vote of the corporation.

But there is here no vote of ratification, either by the corporation or by the directors; and we are not aware of any authority which will justify us in going farther, and holding that a deed of real estate may be ratified by a corporation without vote or writing. The general principle is, that if the act of the agent purport to be under seal, and in the name of the principal, so as to be his deed, the ratification must be under seal: Story on Ag. 246. A parol acknowledgment by a principal, that an agent had authority under seal to enter into a sealed contract obligatory upon his principal, is competent evidence of such authority; but if, at the time of entering into it, the agent had in fact no authority under seal, the subsequent parol acknowledgment and ratification will not bind the principal: *Blood v. Goodrich*, 9 Wend. 68 [24 Am. Dec. 121]; S. C., 12 Id. 525 [27 Am. Dec. 152]; *Steiglitz v. Egginton*, Holt's N. P. 141; *Wells v. Evans*, 20 Wend. 258. And in a case where a sealed instrument was not necessary, but an agent was authorized by parol to enter into a contract for the purchase of timber, and he entered into a sealed contract, a counterpart of which in like form was delivered to the principal, and acknowledged by him as the evidence of the contract, and he received the timber and made some payments, it was held that an action of covenant could not be maintained on the contract: *Hanford v. McNair*, 9 Wend. 54.

A ratification of an act, done by one assuming to be an agent, relates back, and is equivalent to a prior authority: Story on Ag. 235, 239. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner. If a sealed power were not necessary to this as a conveyance of the real estate, but a written vote would have

been sufficient, because a corporation may constitute an attorney by vote for such purpose, then such vote at least must be held necessary to a ratification. We are of opinion, therefore, that this mortgage is inoperative as to the real estate. And this must apply to the fixtures.

The strict rule as to fixtures, that prevails between heir and executor, applies as between vendee and vendor: 2 Kent's Com. 280; *Miller v. Plumb*, 6 Cow. 665 [16 Am. Dec. 456]; 20 Johns. 80;¹ 1 Har. & J. 291.² The same rule applies between mortgagee and mortgagor: *Union Bank v. Emerson*, 15 Mass. 159; *Longstaff v. Meagoe*, 2 Adolph. & El. 167. Machines and other articles essential to the occupation of a building, or to the business carried on in it, and which are affixed or fastened to the freehold, and used with it, partake of the character of real estate, and become part of it, and pass by a conveyance of the land: *Kittredge v. Woods*, 3 N. H. 504 [14 Am. Dec. 393], and cases cited; Amos & Ferard on Fixtures, ch. 4, 132, 151; *Powell v. The Monson & Brimfield Mfg. Co.*, 3 Mason, 459, 464; *Goddard v. Chace*, 7 Mass. 432; *Gaffield v. Hapgood*, 17 Pick. 192 [28 Am. Dec. 390]; *Noble v. Bosworth*, 19 Id. 314; *Kirwan v. Latour*, 1 Har. & J. 291 [2 Am. Dec. 519]. Such articles pass by the conveyance, although disannexed for a temporary purpose: *Richard Liford's case*, 11 Co. 50, cites *Wistow's case*; Shep. Touch. 90. And some things are held to be constructively annexed: 11 Co. 50; Amos & Ferard on Fix. 183; 20 Wend. 639.³ Exceptions have been made, or the property has not been deemed fixtures, in the case of a stone for grinding bark: *Heermance v. Vernoy*, 6 Johns. 5; machines for spinning and carding, attached by "cleats," etc.: *Cresson v. Stout*, 17 Johns. 116 [8 Am. Dec. 373]; *Swift v. Thompson*, 9 Conn. 63 [21 Am. Dec. 718]; and carding machines, secured by nails or spikes driven into the floor: *Gale v. Wood*, 14 Mass. 354.⁴ The report of this last case, however, is somewhat contradictory upon the point, and the case itself was doubted by Chief Justice Richardson, 3 N. H. 506. See also 20 Wend. 641; 3 Dane's Abr. 156. Articles of furniture, it is said, do not come within the rule, although temporarily attached: 20 Wend. 645, cites Gibbon on Fixtures, 20, 21. And see Amos & Ferard, 151, 154, 183-185.

Some of the excepted cases seem to have made the question depend upon the character of the fastening, whether slight or otherwise. But this is a criterion of a questionable character,

1. *Holmes v. Trumper*.

2. *Kirwan v. Latour*.

3. *Walker v. Sherman*.

4. *Gale v. Ward*: S. C., 7 Am. Dec. 228.

not sustained by the weight of the decisions. More depends upon the nature of the article, and of its use as connected with the use of the freehold. Perhaps, however, the case, *Farrar v. Stackpole*, 6 Greenl. 154 [19 Am. Dec. 201], where a chain used with a sawmill was held to be a constituent part of the mill, carried the doctrine of annexation to the extreme point; to say nothing of the mill bars, which it seems were admitted to have passed by the conveyance of the sawmill.

It is not practicable to lay down a rule in a few words which shall be applicable to all cases. The particular circumstances of each case are entitled to special consideration. Different rules prevail in the case of landlord and tenant. Upon the general principles above stated, the kettles set in brickwork were fixtures. So of the steam-engine. Although not attached to any fastening, it could not be removed without taking down part of the building. It may with propriety be said to be constructively affixed. So as to the hand-press let into the floor, and the steam-pipe, probably, although, as to these articles, perhaps farther evidence respecting the mode of annexation, and use, might be desirable. Respecting the cullender there is not sufficient evidence to determine its class.

Loose, movable machinery, not attached nor affixed, even where it is used in prosecuting any business to which the freehold property is adapted, is not to be regarded as part of the real estate, or as an appurtenance to it: *Walker v. Sherman*, 20 Wend. 636, 655; 6 Cow. 665;¹ 1 Har. & J. 291;² *Horn v. Baker*, 9 East, 215. The printing machine, printing shells, and the boiler which lay without the building, and tools, come within this description. A further question then arises, whether the deed executed by Palmer might avail as a mortgage of the personal estate included in it, and whether there be sufficient evidence of its ratification as such.

As to the personal estate, no instrument under seal was necessary. A bill of sale, or a sale without writing, accompanied by delivery, might have passed the absolute property, if the agent making it had authority. In order to a record of a mortgage of personal property, it must of course be in writing, but the statute has not made a seal essential to the validity of such a mortgage. If, then, this instrument can not operate to convey the real estate, nor as a sealed instrument conveying the personal, it may not follow that it is not available as an unsealed

1. *Miller v. Plum*; 8. O., 16 Am. Dec. 456.

2. *Kirwan v. Latour*; 8. O., 2 Am. Dec. 512.

instrument, if it contain anything to authenticate which a seal is not necessary.

In *Hanford v. McNair*, before cited, in which it was held that covenant would not lie on the sealed contract to pay for the timber, Mr. Justice Sutherland said: "The subsequent act of the defendant, under this contract, recognizing and carrying it into effect, may be sufficient to make it binding on him as a parol contract, but can not make it his deed." Upon this, however, he gave no definite opinion. The case of *Banorgie v. Hovey*, 5 Mass. 14 [4 Am. Dec. 417], to which he referred as in some respects essentially different from that case, is also different from this. There was there perhaps a well-founded objection against the declaration. But another question, and the one principally discussed, was, whether a bond which Smith was not authorized to make for the defendants, but by which he attempted to bind himself, and the defendants, as principals, with him, precluded the plaintiff from recovering for the money lent, in an action of assumpsit. Without extending this opinion by a discussion of the matters there decided, it is sufficient to say that the decision was based in no small degree upon the ground that the bond was good against Smith, who was one of the principals, and attempted to bind the rest as their agent; and that it therefore operated as an extinguishment of the simple contract debt which otherwise might have existed against the principals. Mr. Justice Sewall dissented. The case seems to have been very much considered, but the inquiry presents itself notwithstanding, if Smith, as the agent, undertook to bind the other principals, in a manner in which he was not authorized to act, although he had effectually bound himself so that the plaintiff might have pursued his remedy against him upon the bond, on what principle was the plaintiff, by the receipt of such a bond (by which he supposed Smith had well bound all the defendants), precluded from resorting to an implied assumpsit, of all the supposed principals, to pay for the money which Smith borrowed in their behalf, and which it is assumed, in part of the case at least, went to their benefit? The plaintiff had not accepted, nor intended to accept, such a bond as that in question turned out to be (that is, the bond of Smith alone), and in this respect there was a material difference between that case and some of the cases cited in support of the decision. If the bond which the plaintiff received had been what it purported to be, and bound the defendants as well as Smith, then it might well have

been held that the acceptance of the higher security had barred the remedy on *indebitatus assumpsit*.

There seems to be no good reason why this instrument, if it may not operate as a conveyance under seal, should not operate as a mere writing without seal, if the evidence be sufficient to establish it as the transfer of the company, provided a seal had not been put to it. If an agent, authorized to make a promissory note, should make one in the proper form, signing the name of his principal, and put a seal to it—although this could not be declared on as the covenant of the principal, why should it not be valid as his note? If it were in such phraseology that the agent himself might be bound as on his personal covenant, at the election of the holder, why should the holder be compelled to resort to and rely upon that covenant, when neither party at the time contemplated the personal liability of the agent? Why should not the creditor be permitted to reject the seal, which the agent was not authorized to put there, and treat it as it ought to have been, and would then be, a legal parol promise of the principal? Suppose this instrument had contained in addition to the mortgage, a receipt by Palmer for a sum of money, which he as agent was clearly entitled to receive, would it not be as good evidence to show the payment of the money, as a simple receipt by him without any seal? It does contain an acknowledgment of the receipt of the consideration. Whether that be not so connected with the conveyance, that if it can not operate as a deed, it can not properly be evidence, standing alone, to charge them with the receipt of the money, is a question of a character somewhat different, and which need not extend the present opinion.

We see no good reason why, if there be sufficient evidence of ratification, this instrument should not operate as a mortgage of the chattels. As between the parties, no formal appointment is necessary for the execution of an instrument of that character. The agent may be appointed by parol, and his authority shown by evidence of that character. And a mortgage or pledge of the personal property of a corporation, by one undertaking to act as agent, may be shown to be valid, either by evidence of the acts of the corporation, prior to the mortgage, from which an authority to make it may be inferred, or by subsequent acts showing a ratification: *Warren v. Ocean Ins. Co.*, 4 Shepley, 439 [33 Am. Dec. 674]; *Troy Turnpike v. McChesney*, 21 Wend. 296; *Bulkley v. The Derby Fishing Co.*, 2 Conn. 252 [7 Am. Dec. 271]; *Prop. of Canal Bridge v. Gordon*, 1 Pick. 297, 304 [11

Am. Dec. 170]; Story on Agency, 49, 51, 53, 55, 247, 248; Ang. & Ames on Corp. 122, 174; *Fleckner v. U. S. Bank*, 8 Wheat. 363; *Bank of U. S. v. Dandridge*, 12 Id. 64, 70, 74; *Thayer v. The City of Boston*, 19 Pick. 511 [31 Am. Dec. 157].

Was there any ratification here, so that this instrument may operate as a mortgage of the personal property? There is evidence from which it may be inferred that the money received of the savings bank went to the use of the Bellamy company. This is not directly proved, and seems not to be admitted in the argument. But there is nothing to contradict this evidence. It is not shown that James and Ira Haselton had not knowledge that the money was so received, and used. They did not assent to the mortgage, and had no knowledge that any authority was given to Palmer to make it. Still the money may have been used by Palmer, the agent, in the operations of the company. There is no evidence that the Bellamy company have ever objected to the mortgage, or that they have contested the right of possession by the savings bank.

If the act of one professing to be authorized as agent, in the sale or mortgage of property of a corporation, be such as will admit of ratification without any formal instrument or express vote, and the consideration come to the use of the corporation, and is retained, that will be evidence of a ratification. It would clearly be so in the case of an individual. The principal can not be permitted to appropriate the money to his own use, and disclaim the act by which it is acquired. If he take the benefit of what is thus done, he can not reject the burden. If an agent, on the purchase of goods, draw a bill at a shorter date than his instructions permit, the principal may disclaim the transaction; but if he claim the property, he can not deny the agency: *Newhall v. Dunlap*, 2 Shepley, 180 [31 Am. Dec. 45]. A party who has received a legacy under a will, must return or tender it, in order to contest the will: *Hamblett v. Hamblett*, 6 N. H. 337; see also Story on Ag. 245, 253; *Clement v. Jones*, 12 Mass. 60; *Richmond Mfg. Co. v. Starks*, 4 Mason, 296; *Shiras v. Morris*, 8 Cow. 60.

We are of opinion that the instrument, considered as a mortgage of the personal property, has been sufficiently ratified, and may avail, thus far, to the benefit of the trustees. Possession having been taken by the mortgagees, it is not necessary to inquire whether, in order to a valid record of a mortgage of chattels made by an agent, it is not necessary that the authority, or the ratification, as well as the mortgage, should be in writing

and recorded. Whether the savings bank might not have waived the ratification, and elected to consider Palmer as their debtor, we need not determine: *Rossiter v. Rossiter*, 8 Wend. 494 [24 Am. Dec. 62]; 22 Wend. 344;¹ Story, 246. If the savings bank had held the goods, as trustees, at the service of the writ, a taking of them from their possession, by a wrong-doer afterwards, would not discharge them; but it might furnish a ground for delaying the proceedings, until the damages could be recovered: *Swett v. Brown and Trustee*, 5 Pick. 181.

As was suggested, on the argument, this case might have been determined by a much shorter process. At the time of the service of the writ, the trustees had nothing in their hands. They had not taken possession under their mortgage, and the mortgage itself did not charge them with the possession: *Greenleaf v. Perrin and Trustee*, 8 N. H. 273. When they took possession, afterwards, it was either by right, as mortgagees; or as trespassers, if the mortgage was invalid; and a party who takes goods by trespass can not be charged as the trustee of the owner, to whom the wrong is done. But deciding the case upon this ground would, it seems, have been only to bring these questions before us in another shape, and we have therefore passed upon them now, in order to save further expense to the parties.

Trustees discharged.

WHAT FORM OF CONTRACT BY AN AGENT will bind a principal: See *Rice v. Gove*, 33 Am. Dec. 724, and note.

GENERAL RULE AS TO FIXTURES is, that whatever is attached to the freehold becomes part thereof and is not to be removed: *Miller v. Plumb*, 16 Am. Dec. 456; *Coombs v. Jordan*, 22 Id. 236; *Caldwell v. Eneas*, 12 Id. 681. This subject is treated of extensively in the note to *Gray v. Holdship*, 17 Id. 680. Other later decisions in this series are: *Gaffield v. Hapgood*, 28 Id. 290; *McKenna v. Hammond*, 30 Id. 366.

ACT OF THE MEMBERS OF A CORPORATION at any other place than at a meeting of the stockholders is of no effect and is void: *Pierce v. N. O. Building Co.*, 29 Am. Dec. 448, and note, in which the other cases in this series are collected.

CAMPBELL v. WALLACE.

[12 NEW HAMPSHIRE, 362.]

WHERE A PARTITION OF REAL ESTATE BY A PROBATE COURT has been acquiesced in by the heirs for twenty years, the proceedings of the court will be presumed to have been regular, and be held conclusive.

HUSBAND ACQUIRES NO INTEREST IN REAL ESTATE SET ASIDE TO HIS WIFE under proceedings in partition by paying to the other tenants in common or coparceners the amounts due them from his wife.

1. *Evans v. Wells*.

ENTRY BY A STRANGER IN THE NAME OF THE OWNER OF THE FREEHOLD, may, by ratification, become the act of the latter, and will then be sufficient to prevent the bar of the statute of limitations from attaching.

WHERE AN ESTATE DESCENDS TO SEVERAL they are coparceners, without reference to the question whether they are males or females.

NON-JOINDER OF A PARTY TO A REAL ACTION must be pleaded in abatement or the objection is lost.

OBJECTION TO THE MISJOINDER OF THE PARTIES TO A REAL ACTION, if the misjoinder do not appear from the record, must, if not pleaded in abatement, be taken advantage of by a motion for a nonsuit; it will be too late to urge the objection after a verdict.

A CHILD BORN IN FOREIGN PARTS of parents who were originally residents of this state, and who were married here, is not necessarily an alien, nor will the presumption that he is be indulged.

WRIT of entry. The demanded premises were part of the estate left by George Burns, who died in 1807. The heirs of said Burns were his six daughters. Subsequently to his death proceedings in partition were instituted, which eventuated, in the same year, amongst other things, in the award to Esther Lovejoy, one of the daughters of said Burns, of the demanded premises upon her engaging to pay to the other heirs certain sums of money representing the value of their interests in the property. The husband of Mrs. Lovejoy gave bond to Mrs. Tuttle, another of the heirs, to pay her the amount awarded to her. This bond, however, appears to have been subsequently discharged by the obligee therein accepting a conveyance from Mr. Lovejoy and his wife of other premises set apart to the latter, under the proceedings in partition. The other sums decreed to the other heirs were also paid. In 1816 Mrs. Lovejoy died, leaving no issue. The heirs were her sisters and their descendants. The number of these heirs was reduced by other subsequent deaths, so that at the time this action was instituted, it was represented by Mrs. Tuttle, and by the children of Mrs. Campbell, one of the sisters of Mrs. Lovejoy. These children, with the exception of one, were the plaintiffs in the present action. The exception was of a child born to Mrs. Campbell, while she and her husband were residents in Nova Scotia. The plaintiffs, six in number, were all born in this state. The defendant in this action represented a title derived from Mr. Lovejoy, by whom the land had been conveyed after the death of his wife. Plaintiffs relied to take the case from the operation of the statute of limitations upon an entry upon the land in 1835, by Jesse Bowers, a deputy sheriff, who entered thereupon by virtue of a writ in favor of Mrs. Tuttle and her husband, for the recovery of the undivided half in the premises, belonging to Mrs.

Tuttle, as heir of her sister Mrs. Lovejoy, and who, at the request of the attorney for plaintiffs, also made the entry in their behalf. Some objection appears to have been made to the validity of the proceedings in partition, upon the ground that it did not appear that the commissioners had duly notified the heirs of the time when they should proceed to partition. A verdict was taken for plaintiffs subject to the opinion of the court.

Farley & S. K. Livermore, for the defendant.

C. H. Atherton, Abbot, and Fox, contra.

PARKER, C. J. It may be questionable whether the validity of the partition of the estate of George Burns is of importance in the decision of this case. But we are of opinion that after the heirs had acquiesced in it, and an occupation had been had under it for the term of twenty years, the proceedings in the probate court must be presumed to have been regular, and be held conclusive. It appears, therefore, that Esther Lovejoy was well seised of the demanded premises, by means of that partition. The execution of the note by her husband transferred no interest to him. If he had paid the money, there would have been no resulting trust for his benefit. The land was set off to the wife, and the husband would have paid the amount for her, having the benefit of the use himself during the coverture. But it seems the payment was made, in part at least, by the conveyance of two other tracts of land which were the property of the wife.

It appears to be conceded by the course of the argument, that the defendant must rely upon the inability of the plaintiffs to make out their case in the first instance. As Esther Lovejoy never had issue, the land, upon her death, descended to her heirs, and the occupation of it afterwards by her husband, and his subsequent conveyance of it to Crosby, were unwarranted. Her heirs were her sister, Mrs. Tuttle, and the children of Mrs. Campbell, or those of them who may inherit.

The statute of limitations interposes no bar to the maintenance of this action. The descent was in 1816. In 1835, Bowers, at the request of the attorneys of the plaintiffs, made an entry upon the land in their behalf, and the plaintiffs have ratified the act. This is sufficient to prevent the operation of the statute: *Richards et ux. v. Folsom*, 2 Fairf. 70; Co. Litt. 255 a; *Fitchet v. Adams*, 2 Stra. 1128; 2 Kent's Com., lec. 41;

Despatch Line of Packets v. Bellamy Mfg. Co. & Trustees, 12 N. H. 205 [*ante*, 203].

If the plaintiffs and Mrs. Tuttle are to be regarded as parceners, the entry of Tuttle and wife, if it was a general entry, might perhaps have availed for the benefit of the plaintiffs: Com. Dig., Parceners, A, 3; 2 Cruise's Dig. 528. A question is made whether there is any estate in coparcenery under our statutes; and it is objected that if there is, the plaintiffs must be regarded as tenants in common, and the action therefore not well brought, because they have joined in it; and further, that regarding them as coparceners, it can not be maintained, because there is another who ought to have been joined.

By the statute of this state, regulating descents, males and females inherit together in equal shares. If there are no sons, and the estate descends to the daughters alone, there seems to be no reason why that does not constitute strictly an estate in coparcenery. And there is no essential difference in the quality of the estate where the descent is to males as well as females. They take in the same manner, and with equal rights. The title partakes of the nature of coparcenery at the common law, and coparcenery by the custom of gavelkind in Kent, or may be said to be a union of the two: Litt., sec. 241; Co. Lit. 164; Com. Dig., Parceners, B; Id. A, 7. "An estate in coparcenery also frequently arises in consequence of customary descents to all the children, in which case they are coparceners:" 2 Cruise's Dig. 537. The heirs of Esther Lovejoy come, therefore, within the description of coparceners, and might be so regarded if the case required it. The distinction between estates in coparcenery and in common, is undoubtedly of limited importance, and is little regarded here. Chancellor Kent says: "As estates descend in every state to all the children equally, there is no substantial difference left between coparceners and tenants in common. The title inherited by more persons than one is in some of the states expressly declared to be a tenancy in common, as in New York and New Jersey; and where it is not so declared, the effect is the same; and the technical distinction between coparcenery and estates in common may be considered as essentially extinguished in the United States:" 4 Kent's Com. 363 [367]. But we see no sufficient reason why those who thus take by descent should be imperatively required to sever in an action for the recovery of the land, and are of opinion that they may well be regarded as parceners, for the purpose of their remedy in this respect. If they may be considered as

tenants in common, and if they may sever as such, the technical reason why tenants in common must sever does not exist.

Regarding the children of Mrs. Campbell as coparceners, George B. Campbell ought to have been joined, if he is not an alien, and the descent was to him along with the others: Stearns on R. A. 197; *Daniels v. Daniels*, 7 Mass. 136. But the objection should have been taken in abatement: Com. Dig., Abatement, E, 8; Co. Lit. 164 a. This appears to be the settled rule, although the following paragraph, in a late treatise on real actions, by a distinguished jurist, seems to indicate an opinion that it ought to be otherwise. "In the class of pleas to the person of the demandant, Comyns includes those which show that another ought to have joined as demandant in the writ. It is now well settled that in personal actions this defect need not be pleaded in abatement. If the fact appears in evidence on the general issue, or on any issue on which the plaintiff is put to show his title, or cause of action, as set forth in his declaration, he will be nonsuited, or have a verdict against him; and there seems to be no reason why the same rule should not have been adopted in real actions:" Jackson R. A. 68. What class of personal actions is here referred to, is not said. If it be actions arising on contracts it is true, but there is little analogy between a writ of entry, founded on a disseisin by the defendant, and an action on a contract. In personal actions *ex delicto*, which have some similitude, the rule is otherwise: 1 Chitty's Pl. 52, 53; *Wilson v. Gamble*, 9 N. H. 74. In the view we have taken of the case, it is not important to consider whether the recovery by Tuttle and wife, of her share of the land, was not a severance of the coparcenery. If the plaintiffs were treated as tenants in common, the result must be the same. Viewed in that light, they ought not to have joined: *Hills v. Doe*, 6 N. H. 330; *Rehoboth v. Hunt*, 1 Pick. 228.

The reason why the common law should have required tenants in common to sever in real actions is not perhaps perfectly apparent. Although seised by several titles, so that they may be regarded as having several freeholds, a common ownership and a common wrong done might well have furnished the ground of a common action. They must join in trespass or nuisance to their land: 1 Chitty's Pl. 53; *Austin v. Hall*, 13 Johns. 286 [7 Am. Dec. 376]; and in detinue for charters: Co. Lit. 197 b. If one sue alone, it may be pleaded in abatement: Com. Dig., Abatement, E, 10. And it can be taken advantage of only in that way: *Bradish v. Schenck*, 8 Johns. 151 (117, 2d ed.) So they

must join in case, for the destruction of their charters or title deeds: *Daniels v. Daniels*, 7 Mass. 135.

In Massachusetts, Maine, and Virginia, they may join in real actions by statute: 1 Hilliard's Abr. 454, and cases cited; *May v. Parker*, 12 Pick. 38 [22 Am. Dec. 393]; *Swett v. Patrick*, 2 Fairf. 180. And in Connecticut they may join by the common law of that state: *Bush v. Bradley*, 4 Day, 298; *Clark v. Vaughan*, 3 Conn. 191. In Vermont they may join in ejectment: *Hicks v. Rogers*, 4 Cranch. 164. Whether by the practice of that state, or by statute, was not settled. And in this state, where joint tenants sued, it was held to be no defense that they had since, by operation of law, become tenants in common: 6 N. H. 328.¹ These cases may serve to show that the objection is one which can not be extended by any equitable consideration. It is to be taken as matter of authority, on a technical reason.

In what manner the objection, that tenants in common have joined, is to be taken, does not very distinctly appear in the books. Comyns says that in a real action by two, when one only ought to sue, it may be pleaded in abatement: Com. Dig., Abatement, E, 15. But it seems that it is not always necessary to plead this matter specially, either in abatement or bar: Jackson R. A. 70. In personal actions *ex delicto*, if too many be made plaintiffs, and the objection appears on the record, it may be the ground of demurrer, arrest of judgment, etc. If not apparent it may be taken on a motion for a nonsuit: Chit. Pl. 54. The same principle seems to be applicable in real actions, if the objection is not required to be taken in abatement. There is nothing on the record here on which to arrest the judgment. The misjoinder was not moved as a ground of nonsuit, at the trial, and we are of opinion that it is too late to take the exception after verdict.

There is nothing in the case on which we can determine that George B. Campbell is an alien. The fact that he was born in Nova Scotia does not necessarily make him such. If, as was suggested in the argument, Robert Campbell, the father, was a British subject, the children may all be aliens: 2 Laws U. S., Story's ed. 853; 4 Dane's Abr. 700; *Shanks v. Dupont*, 3 Pet. 242; 1 U. S. Dig. 134, pl. 21; Id. 135, pl. 28; *Young v. Peck*, 21 Wend. 392; *Charles v. The Monson and Brimfield Mfg. Co.*, 17 Pick. 70. But that fact does not appear, and is not to be presumed. The case shows him to have been a resident in this country, and to have married here; and the plaintiffs were born here. His sub-

1. *Hills v. Doe*.

sequent removal to Nova Scotia is, of itself, immaterial. The plaintiffs, therefore, as the case stands, make title to six sevenths of the demanded premises.

Judgment for the plaintiffs.

RATIFICATION OF ENTRY BY AN AGENT: See *Lord Audley's case*, Cro. Eliz. 561, in which it is decided that the entry of the agent becomes that of the principal only from the time of the ratification, a principle which, if applied in this case, would have required the heirs to ratify within twenty years from the inception of defendant's adverse possession; and *Bird v. Brown*, 14 Jur. 132; also to be found reported in 1 Parsons on Contracts, page 49, note g, explaining this to have been the point decided in that case.

GRIFFIN v. BIXBY.

[12 NEW HAMPSHIRE, 454.]

WHERE A COMMITTEE TO SET OFF DOWER RUN OUT AND MARK ON THE GROUND one of the lines which they intend as a boundary to the dower lands, the location so made will control a description of the same line, by courses and distances inconsistent therewith, in their return.

A TREE STANDING DIRECTLY UPON THE LINE BETWEEN ADJOINING OWNERS is the common property of both parties, and trespass will lie if one cuts and destroys it without the consent of the other.

TRESPASS *quare clausum fregit*. Plaintiff claimed title to the *locus in quo* derived from the heirs of one Hugh Nahor, deceased. Defendants, one of whom was the widow of said Nahor, contended that the land had been set off to her by the committee appointed to set off her dower. On the part of plaintiff it appeared that the return of the commissioners described the southern boundary line of the dower lands as "running from a pine tree," etc.; thence north eighty-two degrees east, "to the east end of said lot," and that the *locus in quo* was to the south of this line. Upon the part of defendant it was shown, that the commissioners had run out and marked on the ground the line intended as the southern boundary line of the dower lands, and that the line so laid out was not straight, but extended a little to the south of the line described in their return and included the *locus in quo*. There was evidence, however, tending to show that defendants had cut and removed trees standing on the line marked out by the commissioners. The case was submitted to the court for their opinion upon the questions involved.

Farley, for the plaintiff.

J. U. Parker, contra.

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PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor, the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line: *Allen v. Kingsbury*, 16 Pick. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return: *Brown v. Gay*, 3 Greenl. 126; *Ripley v. Berry*, 5 Id. 24 [17 Am. Dec. 201]; *Esmond v. Turbox*, 7 Id. 61 [20 Am. Dec. 846]; *Thomas v. Patlen*, 13 Me. 329; *Prescott v. Hawkins*, 12 N. H. 20, 26; and see 1 U. S. Dig. 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact; which strengthens the case, and shows the propriety of the rule: *Jackson v. Ogden*, 7 Johns. 241; *Clark v. Munyan*, 22 Pick. 410 [33 Am. Dec. 752].

As to the second question: In *Waterman v. Soper*, 1 Ld. Raym. 737, cited for the defendants, Holt, C. J., ruled that if A. plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B., next adjoining, A. and B. are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other can not have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land. But in Co. Lit. 200 b, it is said: "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves." And in *Cubitt v. Porter*, 8 Barn. & Cress. 257, it was held, that "the common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of

those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one: it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted, that for an entire destruction of the wall by one, trespass might have been sustained. Without going to the extent of the ruling in Lord Raymond, we are of opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other: See cases cited in *Odiorne v. Lyford*, 9 N. H. 511 [32 Am. Dec. 387].

ELLIOT v. ABBOT.

[12 NEW HAMPSHIRE, 549.]

BONA FIDE HOLDER OF PROMISSORY NOTE IN WHICH A BANK IS NOMINAL PAYEE may sue thereupon in the name of the bank upon giving it proper security against costs.

A NOTE PAYABLE TO ONE PERSON, BUT DELIVERED TO ANOTHER, as the promise of the maker to him, may be declared upon by the latter in his own name as a note made payable to himself by the name of the third person.

A NOMINAL PAYEE MAY MAKE A VALID INDORSEMENT of a promissory note to the real payee, in order to facilitate an action by the latter.

THE ACT OF A MAJORITY OF THE DIRECTORS OF A CORPORATION, to be of any effect as the act of the corporation, must have been expressed at a regular notified meeting at which all the directors might have been present.

CASHIER OF A BANK HAS NO AUTHORITY TO INDORSE NEGOTIABLE PAPER held by it, for the purpose of transferring the interest of the bank therein, or for any other purpose than to facilitate the collection of the note.

ASSUMPSIT upon a promissory note. A verdict was taken by consent for plaintiff, subject to the opinion of the court upon an agreed case. The material facts not stated in the opinion are these: Townsend was indebted to the defendant, and upon being pressed for payment, told the latter that if he would sign a note payable to the Ashuelot bank, with him, he would get it discounted and pay him something. Defendant consented and did sign the note now in suit. Upon presenting this note at

bank, Townsend was informed that the bank was not discounting, but was referred to the plaintiff who did discount it. Townsend paid over part of the money to defendant and informed him of what he had done, without any objection being advanced by the latter. Subsequently Townsend absconded from the state, and the plaintiff having first obtained an indorsement of the note by the cashier of the bank, brought this action thereon. It was contended that this indorsement was unauthorized. The grounds of this objection appear in the opinion.

Edwards, for the defendant.

Handerson and Chamberlain, contra.

PARKER, C. J. The note in this case was drawn payable to the Ashuelot bank, and there offered for discount. On being refused at the bank, because the bank was not discounting, the cashier referred Townsend, the principal, to the plaintiff, who discounted it, giving an order upon his deposit in the bank. Under such circumstances the plaintiff, with the assent of the bank, might well have maintained an action in the name of the bank, to recover the note for his own use: *Bank of Chenango v. Hyde*, 4 Cow. 567. And in that case Mr. Justice Sutherland, in delivering the opinion of the court, says: "The question is not whether the bank has a general authority to act in the capacity of a trustee, but whether the *bona fide* holder of a promissory note, in which the bank is nominally the payee, has a right to sue in the name of the bank. I apprehend, if the bank had refused the use of its name, a court of equity would have compelled it to allow such use, on proper terms." The doctrine thus suggested seems to be very reasonable; and we are of opinion that in this case the plaintiff might have brought his action in the name of the bank, giving the bank an unexceptionable indemnity against costs; and that the bank could not, under such circumstances, have objected to the prosecution of the action. Nor could Townsend, or the defendant, have made any objection to the maintenance of an action in the same manner as if the bank instead of the plaintiff, had furnished the money.

The plaintiff in our opinion might, also, on the facts in this case, have maintained an action on the note in his own name, declaring on it as made payable to himself, by the name of the president, directors, and company of the Ashuelot bank. Townsend, who had procured the plaintiff to discount it, and delivered

it to the plaintiff, as the promise of himself and the defendant, could not surely be admitted to say that it was not a promise to the plaintiff; and the defendant who received from Townsend, by way of payment, a part of the money received from the plaintiff, with knowledge how it was obtained, without making any objection, and who afterwards in several instances recognized the plaintiff's right to it, in such a manner that it would be competent for a jury to find a promise, on his part, to pay, if that fact would avail, the plaintiff must be held by all these acts to have ratified the act of Townsend in passing the note to the plaintiff, as a promise and obligation to him.

If both the defendants concurred in delivering the note to the plaintiff, as their promise to him, it is immaterial by what name the promise is made to him. He is, in such case, the person to whom the promise is made. And if one so delivers it, and the other afterwards ratifies the act, the result is the same. It would seem that the plaintiff might also maintain an action on the note in his own name, declaring on it as a promise to pay the bearer, upon the ground that the name of the payee might, if he so elected, be regarded as fictitious: *Foster v. Shattuck*, 2 N. H. 446. It would certainly seem to be as available to the plaintiff, as if the name of the payee had been left blank: *Cruchley v. Clarence*, 2 Mau. & Sel. 90.

And it is not clear that the plaintiff might not, on the facts before us, maintain an action on a count for money had and received. The defendant had in fact part of the amount of the note, in money received of the plaintiff. It is true that he received this, not directly from the plaintiff, but as a payment of so much money on a debt due from Townsend to him. But as the note was made partly to raise money, in order that Townsend might pay such money to the defendant, and as he received part of the identical money furnished by the plaintiff, knowing how it was procured, and afterwards recognized the plaintiff's claim; it would not be a very forced construction, so far as the plaintiff is concerned, and for the sake of the remedy, to hold that the money was received to the use of the defendant, as well as of Townsend, although as between themselves, the defendant was but a surety. The form of the plaintiff's action, however, will not permit us to place the case on any of these grounds. It is not brought in the name of the bank; and as he declares only upon a note made to the bank, and indorsed to him, the case, if it can be sustained in its present shape, must be so upon that ground only.

Although the bank never had any interest in this note, we see no objection to regarding it as having been made to them, and indorsed to the plaintiff, if the indorsement can be upheld upon the evidence. The promise is in terms to the bank. The signers did promise to pay the bank; and as they made the promise negotiable, the bank might well transfer it. And it makes no difference to the defendant, whether the bank discounted the note, and then sold and indorsed it to the plaintiff; or whether the plaintiff, having funds in the bank, furnished the money in the first instance; the bank indorsing the note to him, and the defendant assenting to the transfer. Without the acts showing the defendant's assent to the discount of the note by the plaintiff, the case of the *Bank of Chenango v. Hyde* is an authority, as far as it goes, to sustain the plaintiff's right to recover, if the bank has indorsed.

We come, then, to the question, has this note been indorsed to the plaintiff, by the bank? Is that allegation in the plaintiff's declaration sustained? The defendant may deny this. There seems to be no sufficient evidence on which to sustain an indorsement through the acts of the directors. A majority of them assented, it is said; but this was at no regular notified meeting, nor in fact at a meeting of those who did assent, although that would not have been sufficient to have given it the character of an act of the board. There should have been either the act of all (and it is not settled whether that would be sufficient, unless they met together), or there should have been a stated, or regularly notified, meeting, at which all might have been present, in which case the act of a majority of a quorum might have been good: *Despatch Line of Packets v. Bellamy Mfg. Co. and Trustees*, 12 N. H. 205, 224 [*ante*, 203].

If the indorsement is sustained, therefore, it must be on the ground that the cashier had, under the circumstances, authority to make the indorsement. It is contended that the cashier has, *prima facie*, authority to indorse securities held by the bank; and that if he has not authority to transfer the property of the corporation, by the indorsement of a note or bill, without a vote of the directors, he may do what is necessary to collect notes due the bank, or left for collection, or lodged as collateral security. The authority cited for the plaintiff, 3 Mason, 505,¹ seems to hold that the cashier has, *prima facie*, authority to indorse negotiable securities held by the bank, and thereby transfer the property; and in *Hartford Bank v. Barry*, 17 Mass. 97,

1. *Wild v. Bank of Passamaquoddy*.

cited for the defendant, although it is said that "a cashier can not transfer the property of the corporation in a note, without authority from them, or perhaps from the directors, pursuant to powers vested in them by the corporation," yet it is said further that "he may do what is requisite for the recovery of a note." The usage testified to by the cashier, in this case, is in accordance with the principles stated in the latter case. The cashier here states that in no case has he indorsed to transfer the property of the bank, without a special authority. His is not a general power of indorsement, if such may, *prima facie*, exist.

But this case does not come within the principle, or the usage. This was not a note belonging to the bank, or held as collateral security, and indorsed to enable the plaintiff to collect it for the benefit of the bank. Nor was it a note indorsed to the bank, and left for collection, and where an indorsement over was necessary, or convenient, in order to facilitate the collection for the benefit of the owner.

The ground upon which the cashier may indorse the name of the bank, and transfer the legal interest, in any case, is not because the indorsement is merely nominal, transferring no actual property. If it were so, this indorsement might be supported as the indorsement of the bank. But it is, that the cashier is the agent of the bank for that purpose: that by virtue of his appointment as cashier, the bank authorizes him to make indorsements in such cases. Tested by this principle, the indorsement in this case must fail. It is not the act of the bank, because not made by an agent having power to make an indorsement in such case. The directors are the general agents of the bank. The cashier is a special agent, and a matter of this kind is not within the scope of his authority. It can make no difference that the bank had no interest in this matter, or that the bank and the directors have not dissented. There has been no confirmation of the act of the cashier, by the bank, or the directors, and there is no evidence of an assent to this indorsement, by the defendant.

The plaintiff's allegation that the note was indorsed by the bank, therefore, fails; and this is a material allegation as the case now stands. But it is apparent, from the views we have taken of the case, that the merits are with the plaintiff. The objection to his recovery arises not from the want of a cause of action against the defendant, upon the note declared on, but from the failure of the proof to support the particular form in which the declaration is framed. Instead, therefore, of render-

ing judgment for the defendant, as we should do on this case if the merits were with him, the plaintiff, after the verdict is set aside, may, if he desire it, have leave to amend upon terms, and the action may then stand for trial.

Verdict set aside, and leave to amend.

THE PAYEE INTENDED, WHEN A NOTE IS EXECUTED, may sue thereon, though the name of another person is inserted therein: *Commercial Bank v. French*, 32 Am. Dec. 280, and note.

AUTHORITY OF CASHIER OF BANK: *Everett v. United States*, 30 Am. Dec. 584.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

TEN EYOK v. DELAWARE AND RARITAN CANAL CO.

[3 HARRISON, 200.]

OWNER OF LAND THROUGH WHICH STREAM RUNS IS ENTITLED to the continuance of its natural flow, subject only to the right of eminent domain, and any one impairing his right is liable in damages.

STATE MAY APPROPRIATE PROPERTY for public use on making due compensation, but can not appropriate it to a private use except by the owner's consent.

CANAL COMPANY IS NOT A PUBLIC CORPORATION, public corporations being only political corporations, or those founded solely for public purposes, the whole interest therein being in the public.

CANAL COMPANY IS LIABLE IN DAMAGES FOR OVERFLOWING LANDS near to but not adjoining the canal, by obstructing the natural flow of streams through such lands, and its charter authorizing the construction of the canal is no justification.

ACTION on the case. The facts appear from the opinion.

Thompson and Vroom, for the plaintiff.

Williamson and Wall, for the defendants.

NEVIUS, J. The declaration contains four counts. The first alleges, that the plaintiff on the first of May, 1832, was seised of a tract of land of one hundred acres, through which the Raritan and Millstone rivers from time immemorial had been accustomed to flow; that the defendants maliciously filled up and obstructed, narrowed, and hindered the free passage of said river below and opposite said lands, and caused the water to run with violence upon and over said lands, wearing away the soil and destroying the crops, etc. The second count varies from the

first only, in alleging this injury as done to the possession of the plaintiff. The third count charges the injury to be done to the property by means of a dam, erected by the defendants, across the Raritan river, below the lands in question; and the fourth charges an injury to the possession, from the same act of erecting a dam.

The defendants, after pleading the general issue, justify the acts complained of, by four distinct pleas; each of them reciting an act of the legislature of New Jersey, of the fourth of February, 1830, incorporating them with authority to construct a canal from the Delaware to the Raritan river, and to improve the navigation of said rivers below the junction of said canal; to construct locks, works, and devices necessary for the use of the canal, and to enter upon all lands, waters, and streams, subject to compensation in the mode thereby provided. Under this act, in the said several pleas, they justify the wrong complained of, with the following averments, to wit: That in all things, they complied with said act, and became an incorporated company, and entitled to the powers and privileges granted by said act; that they constructed the canal in the most prudent and skillful manner as a public highway, without designing to injure the property of the plaintiff. That the Raritan river is a public highway, belonging to the people of New Jersey; that its navigation has been improved by the construction of the canal. That the plaintiff's lands are not on the route of the canal, but on the opposite side of the river and beyond the back water occasioned by the dam. That the acts complained of are lawful acts, and that the injury is remote and consequential, arising from a public improvement, and common to a large class of the community. That they did to the plaintiff's land, no unnecessary damage; that the supposed wrongs were committed by them as corporators of said corporation, by virtue of said act; that the plaintiff never claimed remuneration for the damage done him, within twelve months from the time of such damage sustained. That they did not enter upon the plaintiff's lands, and that the acts complained of are remote and consequential and done by them in making a public improvement. This is substantially the defense contained in these four pleas; and to these the plaintiff has filed a general demurrer.

This demurrer admits, that the acts complained of were done by the defendants in pursuance of legislative authority, but denies that that constitutes any legal defense to the plaintiff's claim for damages resulting from such acts. As the questions

raised by this demurrer, are in themselves of much importance, and are daily becoming more so, as the system of internal improvements by railroads and canals, is advancing; they deserve the closest examination and most serious deliberation and solemn decision of this court. It is proper, therefore, to define in the outset, the precise situation of these parties, and the claims which they respectively advance in their pleadings. From these we learn, that the plaintiff is the owner and occupier of lands through or along which the rivers Millstone and Raritan have been accustomed to flow, each in an ancient and accustomed channel, from time immemorial. That the defendants by means of embankments below these lands, have narrowed the stream and hindered and obstructed the free and natural flow of their waters, and by means of a dam erected still lower down on the river Raritan, have caused the water to flow back; by means of which acts, he alleges and charges that his soil is washed away and his crops destroyed. The plea admits the truth of these allegations, but justifies the acts by authority of the legislature of this state, and insists that the plaintiff has no lawful claim against them, the defendants, for damages.

The plaintiff, as the owner of these lands, has a clear legal right to the advantages of these streams of water in their ordinary and natural flow, which right can not be impaired or destroyed by any person, natural or artificial, without a corresponding obligation on their part to respond in damages for the injury committed by such interference. He holds this right subject only to the paramount sovereign authority of the government under which he lives, and even that authority is not wholly unrestricted. For upon principles of natural justice and equity upon which are based all systems of civil government, and without which, no government can or ought to endure; this right can not be taken and appropriated, impaired or destroyed, without compensation. I do not mean to be understood, that the government can legally and constitutionally do an act, nor permit another to do an act, which may in its consequences impair the value of that right, without compensation; but I mean to say, that the government itself, for public purposes even, can not take away or destroy the right itself, without making compensation to the owner. The state may by virtue of its right of eminent domain, take private property or destroy private rights, for public purposes, upon making just compensation; but can not do this for private purposes, without the consent of the owner. The defendants rely mainly

upon the position, that the work authorized by their charter, is a public work, designed for public purposes, and in the execution of this work, they acted as public agents and in behalf of the state, and therefore insist, that for these acts done in pursuance of law, the plaintiff is not entitled to recover damages. The plaintiff's right to compensation for the injuries complained of, does not depend in any wise upon the fact, that this is a public work; but the mode of enforcing that right does depend upon it. For if the defendants are to be esteemed as public agents, the remedy can not be against them, but only by an appeal to the justice of the legislature who directed the act. It is important, therefore, to determine the character in which the defendants have done the acts complained of. They admit, that the injuries charged were committed by them as corporators of the corporation chartered by the act of the fourth of February, 1830. But they are certainly not a public corporation. Public corporations are political corporations or such as are founded wholly for public purposes and the whole interest in which, is in the public. The fact of the public having an interest in the works or the property, or the object of a corporation, does not make it a public corporation. All corporations, whether public or private, are in contemplation of law, founded upon the principle, that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is in the eye of the law, designed for public benefit. A turnpike or canal company is a private company, yet the public have an interest in the use of their works subject to such tolls and restrictions as the charter has imposed. The interest therefore, which the public may have in the property or the objects of a corporation, whether direct or incidental (unless it has the whole interest), does not determine its character as a public or private incorporation. In the present case, whatever may have been the objects of the corporation, whether to erect a public navigable highway, or to improve the navigation of the Raritan river, or whether the public have a right to the use and enjoyment of these improvements when made or not, the company are essentially a private company and are not the agents of the state. Their works are not constructed by the requirement of the state, nor at the expense of the state, nor does the stock belong to the state, nor is the state answerable for the lands or materials used in the construction of these works, or responsible for the debts of the company, or for injuries committed by them in the execution of their work. The state could not compel the company to con-

struct this canal or improve the navigation of the river; it has permitted them to do so at their own request. The company might have abandoned the work whenever they saw fit, they may now abandon it without responsibility to the state. In all they have done they have sought their own interest, and if thereby they have incidentally promoted that of the public, it can not reasonably be supposed it was from a liberality beyond that of their fellow-citizens or for the sake of the public. The corporation itself, the property of the corporation, the object of the corporation, are essentially private, subject only to public use, under their own restrictions, and from which use, the company are to derive their profits. The whole scope of their charter indicates clearly that the legislature did not intend to interfere with private and vested rights, without providing a recompense to be paid by the company and not by the state. And if injury or damage has accrued to the private property or rights of others which could not be foreseen or anticipated and therefore not provided for in the charter of the company, this constitutes no reason why the party thus injured should not be compensated. I am of opinion, that the defendants are a private company, and that the law under which they committed the acts complained of, is no defense in the present action.

But it is urged, that the injury complained of is remote and consequential, and common to a large class of the community, and therefore the defendants are not to respond in damages. I do not see the force of this answer. I admit, that in the construction of the canal and in the improvement of the navigation of the river, certain private property and private rights may be materially affected in value, such as withdrawing the business of transportation from its former channel, affecting the goodwill and custom of established stands for the purchase and sale of merchandise and produce, and in many respects changing the whole course and kind of business of a neighborhood, for which the parties whose rights are so affected, can have no remedy by suit at law. But this is a case of every day's occurrence with individuals as well as corporations. The opening a new store, or tavern, a lawyer's or physician's office, may materially affect the income and profits of such as were there before, but this can be no more than a *damnum absque injuria*, and no damages can be recovered. But the present case, as presented by the pleadings, differs materially from those. Suppose that by narrowing this river, diverting its course, or obstructing its passage by a dam, the whole farm of the plaintiff should be

overflowed and destroyed; can any one deny his right to compensation, and if he would be entitled to compensation for a destruction of the whole, is he not entitled to recompense for a destruction of, or injury to a part?

But it is further insisted upon by these pleas, that the plaintiff can not maintain this action, because he made no demand of the defendants within twelve months after the injury sustained. I find no provision in the act requiring him to do so, and am of opinion the demurrer should be sustained.

HORNBLOWER, C. J., and WHITE, J., concurred. FORD, J., absent.

Demurrer sustained.

EMINENT DOMAIN, WHAT USES JUSTIFY EXERCISE OF POWER OF: See the note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686. See also *Whiteman's Ex'x v. Wilmington etc. R. R. Co.*, 33 Id. 411; *Lexington etc. R. R. Co. v. Applegate*, Id. 497, and cases cited in the notes thereto.

APPROPRIATION OF STREAM OF WATER OR INTEREST THEREIN under the power of eminent domain: See *Gardner v. Newburgh*, 7 Am. Dec. 526; *Ex parte Jennings*, 16 Id. 447; *Cooper v. Williams*, 22 Id. 745; S. C., 24. Id. 299; *Boston etc. Corp. v. Newman*, 23 Id. 622; *Varick v. Smith*, 28 Id. 417.

RIGHT OF RIPARIAN OWNER TO NATURAL FLOW OF STREAM OF WATER through his land: See *Coalter v. Hunter*, 15 Am. Dec. 726; *Martin v. Bigelow*, 16 Id. 696; *Blanchard v. Baker*, 23 Id. 504; *Society v. Morris Canal Co.*, 21 Id. 41; *Crooker v. Bragg*, 25 Id. 555; *Buddington v. Bradley*, 26 Id. 386; *Omelvany v. Jagers*, 27 Id. 417; *Davis v. Fuller*, 36 Id. 334.

PUBLIC CORPORATION, WHAT IS: See *Coles v. County of Madison*, 12 Am. Dec. 161; *Regents v. Williams*, 31 Id. 72. In *Rundle v. Delaware etc. Canal Co.*, 1 Wall. jun. 291, Grier, J., quotes with approval the language of the opinion in the principal case as to the defendant corporation being merely a private corporation. The doctrine of the case as to the distinction between private and public corporations is approved also in *Board of Directors v. Houston*, 71 Ill. 322. In *Tinsman v. Belvidere etc. R. R. Co.*, 26 N. J. L. 148, the case is followed on this point, and also as to the liability of private corporations from injuries resulting from their acts in constructing public improvements under the authority of their charters. That case was very similar in its main features to *Ten Eyck v. Delaware etc. Canal Co.*

DAMAGES FOR OVERFLOWING LAND, LIABILITY FOR: See *Stout v. McAdams*, 33 Am. Dec. 441; *Williams v. Nelson*, 34 Id. 45.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW YORK.

CARPENTER v. HERRINGTON.

[25 WENDELL, 370.]

POTATOES NOT YET DUG FROM THE GROUND ARE EXEMPT from execution under a statute exempting "necessary vegetables actually provided for family use."

EXEMPTION STATUTE IS REMEDIAL, and should be liberally construed.

ERROR from Rensselaer common pleas in an action of trespass against a constable for selling on execution certain potatoes planted by the plaintiff on the land of a third person on the shares, the same not having been yet dug from the earth. The plaintiff claimed that the potatoes were exempt under the statute. Judgment for the plaintiff, and the defendant brought error.

C. M. Davis, for the plaintiff in error.

J. S. Olin, for the defendant in error.

By Court, NELSON, C. J. The trial before the justice appears to have been conducted loosely on both sides, and it is therefore somewhat difficult to arrive at any tangible point, to induce the court to interfere. The question whether potatoes in the field are exempt from execution, under the statute 2 R. S. 367, sec. 22, subd. 4, is perhaps in the case, or in other words, whether they may be regarded "as necessary vegetables actually provided for family use." The proof shows the potatoes were planted and raised expressly for such purpose, and that they do not exceed the quantity necessary for the family. It is supposed they must be dug and laid up in store before they can be con-

sidered as provided. "for family use." This is too narrow a construction. The clause is remedial, and should be liberally expounded to effect the humane object in view. The argument assumes that the legislature contemplated the procurement of the articles in some way other than by cultivation; as if the mode of acquiring them was regarded in fixing the exemption. The supposition is preposterous. As the "necessary vegetables" are absolutely exempt, they will be protected in any stage of the process of obtaining them for the family use, whether by planting them, or in any other way.

Judgment affirmed.

EXEMPTION STATUTES ARE REMEDIAL and should be liberally construed in favor of the debtor to effect the object intended: *Robinson's case*, 3 Abb. Pr. 467; *Bitting v. Vandenburg*, 17 How. Pr. 82; *Griffin v. Sutherland*, 14 Barb. 458; *Ford v. Johnson*, 34 Id. 365, all citing the principal case.

POTATOES GROWING IN THE GROUND, EXEMPTION OF.—In *King v. Moore*, 10 Mich. 538, the judges were evenly divided on the question as to whether or not potatoes recently planted and just visible above the ground were exempt from execution as "provisions for the comfortable subsistence of a householder," Campbell, J., and Martin, C. J., holding the affirmative, and Christiancy and Manning, JJ., the negative. The principal case was approved by Campbell, J. It was cited also by Christiancy, J., who seemed to regard it as being a case where the potatoes though not yet dug were mature enough to be fit for food.

PEOPLE v. KENDALL.

[25 WENDELL, 399.]

INFANT MAY BE CONVICTED OF OBTAINING GOODS BY FALSE PRETENSES where he purchases such goods on a credit by falsely representing himself to be a joint owner with his father of certain property.

INDICTMENT for obtaining goods by false pretenses. A verdict of guilty having been found against the defendant in the common pleas by direction of the court, the defendant brought the case here on a bill of exceptions. The defense was that the defendant was an infant at the time of purchasing the goods, and the contract not being binding upon him he could not be guilty of an indictable fraud in making the contract. It appeared that the defendant had defeated an action for the price of the goods by pleading infancy. The other facts appear from the opinion.

H. Van Der Lyn, for the defendant.

J. Clapp, district attorney, for the people.

By Court, NELSON, C. J. The question presented in this case is, whether a minor is within the statute making it an offense to procure goods by false pretences. A very ingenious argument has been submitted by counsel for the prisoner maintaining the negative. The offense as charged, consists in the defendant having procured a fur cap from N. & B. by falsely affirming that he was interested in the stock and other property on a farm occupied by his father. It appears that he lived with his father at the time, who supplied him with the usual necessities for his condition. The contract of sale therefore was not binding, on account of his minority. Hence it is insisted he can not be guilty of fraud or deceit therein, that can in any way affect him, and which are essential ingredients in the crime; that as the contract itself is voidable, notwithstanding the false representations, they are to be disregarded as idle and unmeaning. This is all undoubtedly correct as it respects the civil remedy; for it is well settled that a matter arising *ex contractu*, though infected with fraud, can not be changed into a tort in order to charge the infant by a change of the remedy. Several strong cases to this effect are referred to in the brief submitted. But other considerations present themselves when viewing the case in a criminal aspect, to which effect must be given, and which are decisive against the prisoner.

The statute, 2 R. S. 564, sec. 53, is general, "every person, who with intent to cheat or defraud another," "shall be punished," etc. It contains no exception in favor of infants. All the books agree that where an act is denounced as a crime, even of felony or treason, by a general statute, it extends as well to infants, if above fourteen years, as to others: 1 Hawk. 1; 4 Bl. Com. 23; Hale P. C. 21; 3 Bac. 592; Reeves Dom. Rel. 257. The gist of the offense here consists in procuring the goods of another by false pretenses, with the intent to cheat and defraud; intentionally and fraudulently inducing the owner to part with his property by willful falsehoods, in representing himself to be in a condition in which he knew he was not: 14 Wend. 558; 11 Id. 565.¹

The legal effect of any contract that may have been formally entered into in the course of committing the offense: in other words, the question in respect to any civil remedy, the party defrauded might have against the prisoner, is not at all material in defining the crime. They are wholly distinct and disconnected, and depend upon the application of a different set of

1. *People v. Haynes*; S. C., 28 Am. Dec. 530.

principles. Suppose a minor in entering into a contract not binding upon him on account of his privilege, should commit a forgery, or pass counterfeit money: can there be a doubt but that he would be punishable for the offense, though the contract itself, of which the act is perhaps but in part execution, was void or voidable? It is a perversion of the whole doctrine of the privilege of an infant, to extend it to an exemption from criminal responsibilities in the sense contended for by his counsel. He is, indeed, thus privileged in a degree when under the age of fourteen; for then he is presumed to be *doli incapax*, and the prosecutor must show, affirmatively, to the court and jury that his understanding has reached to sufficient maturity and strength to distinguish between good and evil. The evidence of malice will supply age. This is the extent of the privilege in a strictly criminal point of view. There are cases going beyond this, where the corporal punishment is but collateral, and not the direct object of the proceeding against the infant; but it is unnecessary to look into them, as they have no bearing upon the question here: 3 Bacon, 591; Reeve, 257.

It was very early held that minors were subject at common law to punishment for the offense here charged; such as cheating with false dice: Sid. 258; 1 Hawk. 343, tit. Cheats, 9 Vin. 396, pl. 18. So under the statute of 33 Hen. VIII., c. 1, it seems to have been determined that an infant might be convicted for procuring goods by false token, showing himself of age, and afterwards pleading his infancy: Hawk. 345, n. 2.

The proceedings must be remitted to the general sessions of Chenango, with directions to proceed to judgment.

CRIMINAL LIABILITY OF INFANTS: See *State v. Aaron*, 7 Am. Dec. 592; *State v. Guild*, 18 Id. 404.

INFANTS' LIABILITY FOR TORTS, especially for those growing out of or connected with contracts, see the note to *Humphrey v. Douglass*, 33 Am. Dec. 179. In *Wallace v. Moss*, 5 Hill, 392, the principal case is cited to the point that an infant is chargeable by action for a tort in obtaining goods fraudulently with an intention not to pay for them. In *Campbell v. Perkins*, 8 N. Y. 440, on the other hand, Taggart, J., quotes with approval what is said above by Chief Justice Nelson, that matter arising *ex contractu*, though tainted with fraud, can not be converted into a tort to charge an infant; and *Wallace v. Moss*, *supra*, is referred to as apparently militating against this doctrine. In *Moore v. Eastman*, 4 N. Y. Sup. Ct. (T. & C.) 40; S. C., 1 Hun, 580; and *Hewitt v. Warren*, 10 Id. 564, the principal case is cited as recognizing the doctrine that an infant is not liable for a tort arising *ex contractu*, unless the tort amounts to an election to disaffirm the contract, or unless the other party has first disaffirmed the contract because of the tort. In *Merriam v. Cunningham*, 11 Cush. 43, the case is referred to, among

others, as authority for the principle, that fraudulent representations made by an infant in procuring a contract can not be set up as an answer to the plea of infancy in an action on the contract.

INTENT TO CHEAT AND DEFRAUD is of the gist of the action in a prosecution for obtaining goods by false pretenses: *Clark v. People*, 2 Lans. 332; *Brown v. People*, 16 Hun, 537, both citing the principal case. See also *People v. Haynes*, 28 Am. Dec. 530.

RYERSS v. WHEELER.

[25 WENDELL, 434.]

PAROL PARTITION CARRIED INTO EFFECT BY POSSESSION in accordance therewith, is binding between tenants in common whose titles are distinct.

PAROL PARTITION BY GRANTOR OF HUSBAND WHO IS TENANT BY CURTESY, the wife not having acknowledged the deed so as to pass her interest, though not binding on the wife, is good in ejectment against a stranger.

DECLARATION IS AMENDABLE AFTER VERDICT for the plaintiff in ejectment, to conform to the nature of his title, where he claims title to the whole of the premises, but his title as to an undivided part is subject to be defeated by a future claim of a *feme-covert*.

EJECTMENT for fifty acres of land. The plaintiffs, Ryerss and Pierson and wife, alleged in the fifth and seventh counts of their declaration that they were, on a certain day, possessed of the premises, describing them by metes and bounds, the said Ryerss and the wife of Pierson claiming title in fee, and the said Pierson claiming as tenant by curtesy in right of his wife, and that while so possessed they were ejected by the defendant. The premises in question constituted half of a certain lot which formerly belonged to one Lindsley, who, in 1794, conveyed an equal undivided moiety of his said lot to one G. Ryerss, who afterwards died, leaving as his only children and heirs the plaintiff Ryerss and the wife of the said Pierson. Lindsley also died, and his children and heirs conveyed their interest in said lot, of which the premises formed a part, to one Hopkins, who conveyed to one Travis. It appeared that three of Lindsley's daughters were married women, and although they joined with their husbands in the conveyance to Hopkins, they had not acknowledged the same so as to pass their interest. In 1810 a dividing line was established between the north and south parts of said lot by Travis and the plaintiffs, Travis occupying the north part, and the plaintiffs the south part, the premises now in question, and it appeared that the parties had ever since occupied their respective portions of said lot in accordance with said line. After proof of these facts by the plaintiffs at

the circuit, the defendant moved for a nonsuit, on the ground that the plaintiffs had not proved title according to their allegations, because the said daughters of Lindsley, not having acknowledged the deed to Hopkins, were still entitled to three sevenths of an undivided moiety of the said lot, and because their title not having passed to Hopkins, the parol partition agreed to by his grantee was inoperative. Motion overruled, and verdict for the plaintiffs, which the defendant moved to set aside.

A. Worden, for the defendant.

H. Welles, for the plaintiffs.

By Court, NELSON, C. J. It has been repeatedly decided in this court that a parol partition, carried into effect by possession and occupation in conformity thereto, will be binding between tenants in common, whose titles are distinct, and the only object of the division is to ascertain the separate possessions: 4 Johns. 292;¹ 9 Id. 270;² 14 Wend. 619;³ Co. Litt. 169 a; Com. Dig., Parceners, c. 5. Here has been an acknowledged division and occupation accordingly, by the parties, for some thirty years. I admit it will not be binding upon the three daughters of Lindsley, who were *femes-covert*, and did not acknowledge the deed to Hopkins. But it would have been binding upon the husbands, who were tenants by the curtesy, if parties to the arrangement. They could have consented, and those who are in under their title, can do the same during the continuance of their estates. A different question will arise when the three heirs appear and claim their undivided interest. That can not happen till the death of their husbands, who, for aught that appears, are still living. The plaintiffs, therefore, are entitled to the possession of the whole of the fifty acres. There may be some difficulty under the revised statutes in describing the precise nature and extent of their title: because, as to three sevenths of the premises, it may be defeated by the future claim of the *femes-covert*. The question is reduced to one of form, and the declaration is amendable, so as to conform to the nature of the title of the plaintiffs. We see no objection to the verdict standing upon the fifth and seventh counts of the declaration. It will not conclude the rights of the *femes-covert*, they not being parties to the suit; and it can not lie with the defendant to dispute the effect of the partition, which, while it

1. *Jackson v. Harder*, 4 Johns. 292; S. C., 4 Am. Dec. 262.

2. *Jackson v. Vosburgh*; S. C., 6 Am. Dec. 276.

3. *Corbin v. Jackson*; S. C., 28 Am. Dec. 580.

remains in force, shows an exclusive right in the plaintiffs to the possession of the premises.

New trial denied.

PAROL PARTITION, VALIDITY OF: See *Porter v. Perkins*, 4 Am. Dec. 52; *Jackson v. Harder*, Id. 262, and note; *Jackson v. Vosburgh*, 6 Id. 276; *Haughabaugh v. Honald*, 5 Id. 548; *Compton v. Mathews*, 22 Id. 167; *Corbin v. Jackson*, 28 Id. 550 and note; *Booth v. Adams*, 34 Id. 680. Parol partition accompanied by possession in accordance therewith, is binding on tenants in common holding by distinct titles: *Mount v. Morton*, 20 Barb. 128; *Otis v. Cusack*, 43 Id. 549; *Baker v. Lorillard*, 4 N. Y. 262; *Wood v. Fleet*, 36 Id. 504, all citing the principal case.

AMENDMENT OF DECLARATION IN EJECTMENT is freely allowed: See *Den v. Snowhill*, 22 Am. Dec. 496: See also *Tuttle v. Jackson*, 21 Id. 306. If the plaintiff in ejectment fails to prove title to as much as he claims, he may recover according to the proof, and the declaration may be amended in conformity therewith: *Kellogg v. Kellogg*, 6 Barb. 131, citing *Ryeras v. Wheeler*.

C A S E S
IN THE
COURT FOR THE CORRECTION OF
ERRORS
OF
NEW YORK.

VAN HOOK *v.* WHITLOCK.

[26 WENDELL, 43.]

LIMITATION OF THREE YEARS PRESCRIBED FOR ACTIONS UPON STATUTES by parties aggrieved to recover benefits secured thereby, under the New York statute of limitations, does not, it seems, apply to a bill filed by creditors of a corporation, under a provision in its charter to charge the stockholders with payment of its debts.

DEBTS CREATED PRIOR TO PASSAGE OF ACT DISCHARGING INSOLVENT CORPORATIONS and their stockholders from all their corporate liabilities upon making the assignment therein prescribed, are exempt from the operation of a discharge under such act, because, as to them, the act is unconstitutional; but a creditor accepting a dividend under the assignment waives the benefit of the exemption and his debt is barred.

APPEAL from chancery. The nature of the suit is stated in the opinion. The chancellor dismissed the bill, holding the claims of the complainants to be barred by the statute of limitations, and also by a discharge under the act of 1814, relating to insolvent corporations: 7 Paige Ch. 373. The complainants appealed.

D. D. Field and *G. Wood*, for the appellants.

S. A. Foot and *G. Griffin*, for the respondents.

By NELSON, C. J. The bill in this case was filed by several creditors of the Commercial insurance company of New York for the purpose of charging the defendants, as stockholders of the same, under the twelfth section of its charter, which

declared, that in respect to all debts contracted by the corporation previous to the expiration of its charter, the persons composing the company at the time of its dissolution should be responsible in their individual and private capacity to the extent of their respective shares of stock at the time.

The several debts of the complainants had accrued before the passage of the act of April, 1814, respecting incorporated insurance companies in cases of their insolvency, of which act this company took the benefit in July of the same year, and were discharged from their debts in pursuance of its provisions. The second section of the act makes the assignment under the order of the proper officer, a full discharge not only of the corporation, but also of the president, directors, and stockholders of the company from all debts due at the time of the assignment. The complainants admit that they have received from the assignees, under the act of 1814, several dividends out of the assets of the company, amounting in the whole to fifty-one per cent. upon their respective demands. The defendants mainly rely, as a defense to these claims by the creditors of the company, and as exempting them from personal liability: first, upon the statute of limitations which they set up in analogy to proceedings at law, the case not being one of exclusive equity cognizance; and, second, upon the discharge of the chancellor under the act of 1814.

1. As to the statute of limitations: A clause in the sixth section of the R. L. 1813, p. 187, and the like provision continued in 2 R. S., sec. 81, p. 298, is referred to on this branch of the case. It is found in a section of our act of limitations, that relates to actions, informations, and indictments sued out and exhibited for forfeitures upon penal statutes, and which provides, that where the forfeiture is given to the people, the limitation shall be two years; if given to any person who shall prosecute, or to the people and any such person, then one year for the person to sue; and in case of default, two years in behalf of the people after the one is ended; and then comes the clause in question, substantially as follows: "And that all actions or informations that shall at any time be sued or exhibited for any forfeiture, or cause upon any statute, the benefit or suit whereof is given, or limited to the party aggrieved, shall be sued, etc., within three years next after the offense or cause of action accrued, and not after." This particular clause is not found in 31 Eliz., c. 5, sec. 5, from which the rest of the section is taken; and the reason of its insertion obviously grew out of a defect in

the English statute, which omitted to provide for any limitation where the forfeiture was given to the party aggrieved: 1 Tidd, 14; Willes, 443, n.;¹ 1 Ld. Raym. 78.² We have several penal statutes, where the penalty or forfeiture, instead of being given to the people, or common informer, is limited to the aggrieved party. There are also others penal in their nature, in which the remedy is confined to the party injured; and were it not for this provision, there would be no limitation to the period for bringing these actions. This view gives full operation and effect to the clause without claiming for it the broad construction insisted upon by the learned courts below.

I do not, however, intend to discuss the question, not regarding it material in the view I have taken of the case; but felt bound to present it for the purpose of entering my dissent to the construction attempted to be given to the clause. If it really possesses the sweeping effect claimed, for aught I see, it must present a short bar of three years to every action, and cause of action arising out of and founded upon any statutory regulation: such as suits against heirs, executors, and administrators, the presidents and other officers of corporations under the general banking law, besides many others that might be enumerated. Certainly, the suit is as completely founded upon the statute against the president of the bank, and the creditor is as much aggrieved by the non-payment of his debt by the institution, as can be predicated of the case under consideration; and if the three years' bar is applicable to the one case, I do not see how it can consistently be denied in the other. But I forbear going into the argument.

2. As to the discharge: As all the debts of the complainants accrued before the act of 1814, under which the discharge was granted, the act is clearly inoperative according to the doctrine of *Sturges v. Crowninshield*, 4 Wheat. 122, and *Ogden v. Saunders*, 12 Id. 213, as impairing the obligation of the contract, unless there is something in the case that forbids the application of the doctrine of these cases. As I understand the final decision of the court in the case of *Ogden v. Saunders*, as delivered by Mr. Justice Johnson, it was intended to hold, that as between citizens of the same state, the insolvent's discharge is valid as it affects contracts made posterior to the law; but as against citizens of other states it is void, as to all contracts wherever made. Accordingly a discharge in New York, under the law of 1801, from a debt contracted in the state with a citizen of Kentucky,

1. *Plymouth v. Werring*.

2. *Chance v. Adams*.

after the passage of the act was held void, and in *Shaw v. Robbins*, 12 Wheat. 369, n., a like judgment was given. A majority of the court concurred in the opinion of Mr. Justice Johnson, and have since regarded the principles there established as the settled law of the court: 6 Pet. 348 and 635.¹

Mr. Justice Story, in his commentaries on the constitution, thus states the result of the various decisions: 1. That they (the state insolvent laws) apply to all contracts made within the state between citizens of the state. 2. That they do not apply to contracts made within the state between a citizen of the state and a citizen of another state; and, 3. That they do not apply to contracts not made within the state. In all these cases it is considered, he observes, that the state does not possess a jurisdiction co-extensive with the contract over the parties, and, therefore, that the constitution of the United States protects them from prospective as well as retrospective legislation: 3 Story's Com. 256. Still I am not aware that it has been directly determined by any case in the supreme court of the United States, that the discharge would not be a bar against a citizen of another state, where the suit is brought in the court of the state in which it was granted, and upon a contract made therein posterior to the law.

But in *Clay v. Smith*, 3 Pet., 411, the court held, that if the creditor voluntarily makes himself a party to the proceedings under a state insolvent law which discharges the debt, and accepts a dividend declared under the law, he will be bound by his own act, and be deemed to have abandoned this extraterritorial immunity. The facts are so imperfectly stated in the report of the case, that no principle can be deduced from the decision, except we may presume that without the assent of the creditor to the proceedings, by coming in and accepting a dividend, the discharge would have been invalid. The principle is not new, as it had been before repeatedly recognized in analogous cases, both in this country and in England: 3 Cai. 154;² 8 Barn. & Cress. 477; 2 Kent's Com. 393, n., 3d ed.; Baldwin's C. C. 296;³ 2 Pet. Dig. 470. In *Phillips v. Allan*, 8 Barn. & Cress. 477, a discharge under the law of Scotland was set up against a debt contracted in England, which was conceded to be no bar; but the plea averred that the plaintiff appeared in the court in Scotland and opposed the discharge of the defendant, which was relied on as evidence of his consenting to be bound by that law.

1. *Boyle v. Zacharia*.

2. *Van Raugh v. Van Arsdale*; S. C., 2 Am. Dec. 259.

3. *Woodhull v. Wagner*.

That conclusion from the premises, was denied by the court; but it was conceded that if he had taken the benefit of the law by coming in and receiving a distributive share of the property, it would have been otherwise. That would have been such an assent as might have bound him. Our insolvent act recognizes the same principle by declaring that the discharge shall exonerate the insolvent from all debts contracted within the state, etc., owing to persons not residing within it, who shall have united in the petition for the discharge, or shall have accepted a dividend from the estate: 1 R. S. 781, sec. 30. This ground, therefore, taken by the chancellor in favor of the defendants, I think, affords a clear and decisive answer to the several demands of the complainants; upon which, alone, I shall vote for an affirmance of his decree.

On the question being put, Shall this decree be reversed? the members of the court present at the argument unanimously answered in the negative. Whereupon the decree was affirmed.

VALIDITY OF STATE INSOLVENT LAW as respects antecedent debts, and debts owing to citizens of other states: See the note to *Norton v. Cook*, 23 Am. Dec. 346, where this subject is discussed at length. See also *Frey v. Kirk*, Id. 581, and note; *Van Raugh v. Van Arsdaln*, 2 Id. 259; *Smith v. Smith*, 3 Id. 410; *Baker v. Wheaton*, 4 Id. 71; *White v. Canfield*, 5 Id. 249; *Blanchard v. Russell*, 7 Id. 106; *Vanuxem v. Hazlehursts*, Id. 582; *Mather v. Bush*, 8 Id. 313; *Hicks v. Hotchkiss*, 11 Id. 472; *Smith v. Parsons*, 13 Id. 608. In *Brigham v. Henderson*, 1 Cush. 432; *Gardner v. Lee's Bank*, 11 Barb. 564, and *Hoyt v. Thompson*, 5 N. Y. 349, the principal case is cited to the general position that a discharge under a state insolvent law does not affect claims of citizens of another state. In *Pratt v. Chase*, 19 Abb. Pr. 160; S. C., 29 How. Pr. 305, and *Davidson v. Smith*, 1 Biss. 353, the intimation in the principal case that an insolvent discharge in one state will bar a debt due a citizen of another state, who sues in the courts of the former state, is approved. In the case last cited the debt was a judgment recovered prior to the discharge.

NON-RESIDENT CREDITOR DOES NOT WAIVE IMMUNITY from the operation of a state insolvent law by appearing and opposing the debtor's petition on an order to show cause: *Norton v. Cook*, 23 Am. Dec. 342.

PARTY MAY WAIVE CONSTITUTIONAL PROVISION or prohibition in his favor: *Lee v. Tillotson*, 35 Am. Dec. 624, and cases cited in the note thereto. The principal case is recognized as an authority to the same effect in *Vose v. Cockcroft*, 44 N. Y. 423; *Pierson v. People*, 79 Id. 429, and *People v. Williams*, 3 N. Y. Sup. Ct. (T. & C.) 341.

STATUTE OF LIMITATIONS AS TO ACTIONS UPON STATUTES for the benefit of parties aggrieved, limiting such actions to three years, was held, in *Freeland v. McCullough*, 1 Den. 424, to apply to suits against stockholders of a corporation to charge them with debts of the corporation under the statute. This is contrary to what is laid down on that point in the principal case. It is said, however, in *Freeland v. McCullough*, that the point was not "directly in issue or material," in *Van Hook v. Whitlock*. The case is cited on the same point in *Lindsay v. Hyatt*, 4 Edw. Ch. 100, and *Lowry v. Inman*, 2 Sweeny, 142

REMSEN v. BRINCKERHOFF.

[26 WENDELL, 325.]

PUBLICATION OF WILL IS NECESSARY, UNDER NEW YORK STATUTE OF 1830, to give it validity, and to constitute such publication there must be some communication by the testator to the witnesses at the time of signing or acknowledging the will, indicating an intention to give effect to the paper as the testator's will, but no particular form of words is necessary.

MERE WANT OF RECOLLECTION OF WITNESSES TO WILL, that the testator indicated the instrument to be his will, is not evidence *per se* of non-compliance with requisites of the New York statute of 1830, as to publication, where the attestation clause states that the testator declared the instrument to be his will. But where the witnesses testify that neither the attestation clause nor the will was read by them, and that the testator did not state the instrument to be his will, but at the time of signing merely acknowledged it to be his "hand and seal for the purposes therein mentioned," there is no proof of publication, and the will is inoperative, although the attestation clause may state that there was publication.

APPEAL from a decree of the court of chancery, reversing a decree of the surrogate, admitting to probate an alleged will of Dorothea Brinckerhoff, purporting to have been executed in 1834, which decree of the surrogate had been affirmed by one of the circuit judges on appeal. The attestation clause, signed by the witnesses, stated that the testatrix, at the time of signing and sealing the will in their presence, acknowledged to each of said witnesses "that she subscribed the said writing, and declared it to be her last will and testament;" and that they subscribed their names in her presence and in the presence of each other, etc. The witnesses stated, however, that the will was not read to the testatrix, nor did the witnesses read it or any part of it, except that one of them read the last line of the attestation clause. Both witnesses testified that they saw the testatrix sign and seal the will, and that she acknowledged it "to be her hand and seal for the purposes therein mentioned," but that it was not stated by her or by any person present that the instrument was a will, nor was that question asked by the witnesses. One of them stated that he omitted to write his place of residence, and that the testatrix, observing it, asked him to supply the omission. It was upon this evidence that the surrogate admitted the instrument to probate. From the chancellor's decree reversing this decision, the executrices named in the instrument appealed.

G. Griffin, for the appellants.

G. Brinckerhoff, for the respondents.

By NELSON, C. J. The question involved in this case is simply as to what constitutes a legal execution of a will, under the provisions of our revised statutes. It is a question of first impression, and it is of great importance that it should be early and finally settled. The weight of authority in England, as abundantly shown by the cases, very ably reviewed by the chancellor, and by others that might have been referred to, 1 Phill. Ev. 50; 2 Stark. Ev. 920, is, that under the 29 Car. II., c. 3, sec. 5 (of which our old statute concerning wills was a copy), no publication by the testator, in the sense declared by our recent act, was required as essential to the validity of the will; and this, I think, has been regarded as the law in this state before the act of 1830, though I do not find that the attention of the courts has ever been drawn to the particular point in any of the cases: 1 Wend. 412, 413.¹

In *Moodie v. Reid*, 7 Taunt. 355, decided in 1817, Chief Justice Gibbs observed, "that a will, as such, requires no publication; that be the publication what it may, a will may be good without it." Again, he remarked, that he had called on the bar in the course of the argument, to say what publication was? that he did not wonder he had no answers, for though parties use the term publication, it was a term in this sense, unknown to the law. But in *Doe v. Burdett*, 4 Ad. & El. 1, decided in 1835, Lord Chief Justice Denman, referring to this case, and to the opinion thus expressed by Chief Justice Gibbs, took particular pains to guard against any inference that he meant to be taken to acquiesce in the correctness of the opinion.

Some elementary writers on the subject, in England, of high authority, assume that publication of some kind is essential, according to the cases under the 22 Car. II. Among others, Mr. Cruise, tit. Devise, 38, c. 5, sec. 43, and Powell, 1 Jarman's Powell, 90. It was, doubtless, this contrariety of opinion, and uncertainty upon so important a subject of the law, that led to the act of 1 Victoria, c. 20, in 1837, by which any other proof of publication is dispensed with, except what arises from the act of signing, or acknowledging the instrument in the presence of the witnesses; and which had previously induced the legislature of this state, in 1830, while revising the law, to declare with equal explicitness the necessity of publication to give validity to the will. Both statutes were intended to settle the law, which is, undoubtedly, of vastly more importance than that it should be settled in favor of one or the other of the conflicting

1. *Jackson v. Vickory*; S. C., 19 Am. Dec. 522.

opinions. Ours followed the lead of those which maintained that some sort of publication was necessary; while the English statute has dispensed with it.

Nothing can be more explicit than the law of 1830, 2 R. S. 7, sec. 40. Four distinct ingredients, as declared, must enter into, and together constituting one entire, complex substance, essential to the complete execution: 1. There must be a signing by the testator at the end of the will. 2. The signing must take place in the presence of each of the witnesses, or be acknowledged to have been made, in their presence. 3. The testator, at the time of signing or acknowledging the writing, shall declare it to be his last will; and 4. There must be two witnesses. Now, it is obvious, that every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another; that there must be a concurrence of all to give validity to the act, and that the omission of any is fatal. The third subdivision was intended as a statutory declaration of what is understood, in technical language, to be a publication; it is found in juxtaposition with the admitted requisites of signing, and witnesses; and can no more be dispensed with in passing upon the validity of an execution, as being in conformity with the law, than either of these. It prescribes, in general terms, what shall amount to publication. The testator must not only declare the instrument to be his will, but he must so declare at the time of signing or acknowledging—which act, by the previous clause, is to be done in the presence of the witnesses. Such declaration must, therefore, be made in their presence.

I agree that no form of words will be necessary; that the legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will. Any communication of this idea, or to this effect, will meet the object of the statute. It would be unwise, if not unsafe, to speculate upon the precise mode of communication; as every case must depend upon its own particular circumstances. The statute itself is plain, and it is to be hoped, will be obeyed in a way to leave little or no room for construction. When we come to that, the only sure guide for the courts will be to look at the substance, sense, and object of the law, and with the aid of these lights, endeavor to ascertain if there has been a substantial compliance. I agree, also, that the mere want of recollection of the witnesses, that the testator indicated the instrument to be his will, after signing the attestation clause,

ought not to be evidence *per se* of non-compliance with the statute. After this, there should be something like affirmative proof of the want of publication.

But whatever may be the mode that may hereafter be approved, by which the testator may indicate that the instrument the witnesses are requested to subscribe, as such, is intended as his will, it is entirely clear nothing to that effect appears, directly or indirectly, from the testimony in the case before us. Not one word, or sign, or even act, passed within the hearing or presence of the witnesses at the time of the execution, tending to this effect. The testimony presents the bald case of an execution according to the forms of the old law, without at the time, advertent to the new provision. The instrument in question, can not, therefore, be upheld without a virtual repeal of the statute; and though I may not admire the wisdom of the change, but have preferred the solemnities, as I think, heretofore understood in this state, and as have been settled by the recent act in England, we shall unquestionably, best consult our duty, as well as the interest of all hereafter concerned in testamentary dispositions, by giving full force and effect to the statute, fixing thereby a well-known and permanent rule for their guide. I shall therefore vote to affirm the decree of the court below.

By VERPLANCK, Senator. The able counsel for the respondents, in the course of his argument, assumed and argued from a speculative principle, from which I can not refrain from expressing my dissent. He maintained with Blackstone and Paley, that the right of controlling the disposition of property, by will or devise, after death, is entirely the creation of municipal law, directed by considerations of policy and general expediency; and denied it to be in any sense a natural right, merely controlled and modified by positive regulations. This view of the origin of the right necessarily leads to a more strict exaction of the terms imposed by law upon the execution of testamentary dispositions, since on this theory the right itself rests wholly upon a previous literal compliance with the express requisitions of law. To me on the contrary it seems clear, in spite of high legal and ethical authority, that the right of giving to others, what has been formed or rendered valuable by our own labor, or purchased from or bestowed by those whose labor has given it value, must last to the very moment of death. Thus spake the voice of nature in the earliest patriarchal times, and so it still speaks in the rudest nations; whilst the most cultivated legal reason concurs in the same judgment, and pro-

nounces with Mansfield, that "the power of willing naturally follows the right of property:" *Wyndham v. Chetwynd*, 1 Burr. 414. Why has not he who has the right to give to whom he pleases, throughout all the rest of his life, the same right at his last hour, or in anticipation of his last hour? The legal right to bequeath personal property has been acknowledged and exercised from the most remote antiquity, and in all nations. That of devising real estate was restricted in some countries upon avowed or obvious grounds of public policy, peculiar to their own institutions. It was so by our ancient common law, for reasons of feudal policy, the very same that forbade alienation by deed, or the sale of a man's own land during his life. When therefore our statute law enacted that all persons (with certain named exceptions) might devise or bequeath real or personal property, the legislature did in that respect precisely what had been done as to the right of selling land when it was enacted that "any person capable of holding land might also convey it." In both cases the common law restriction of natural right was repealed, whilst for the purposes of security and justice various formalities were made necessary to the execution and proof of deeds and wills as essential to their evidence and proof of authenticity; for this natural right, like all other natural rights exercised in human society, can be regulated and modified by law for the common good. It may be limited, restrained, regulated by positive enactment. It is upon this principle of original right, prior to any statute, that courts have always rightly looked to the intent of the testator and favored its execution. But if that right existed only by means of law, intention would be nothing; the right would not exist till the requisitions of law conferring it had been literally complied with. This distinction is admirably summed up by Dr. Johnson, in a very remarkable example of his logical talent, a discussion of certain points of Scotch law, for the use of his admiring biographer. "All possessions are by natural right wholly in the power of the present owner, and may be sold, given, or bequeathed, absolutely or conditionally, as judgment shall direct or passion incite. But natural right would avail little without the protection of law, and the primary notion of law is restraint in the exercise of natural right. A man therefore in society is not fully master of what he calls his own, but he still retains all the power which law does not take from him." The question then in every case like the present, is not whether the testator has become entitled to devise, by full compliance

with the letter of the law, but whether there has been such a neglect of the legal requirements enacted to guard against fraud, as to make the will inoperative, as an evidence of intention, and consequently to leave the property to be governed by the general laws of descent or distribution.

The practical results to which these opposing views of an apparently theoretical principle may often lead, will, I trust, excuse this digression upon a doctrine much insisted upon in the argument; and although it is not immediately necessary to support my own conclusions in the present case, I think it may be of much importance in the decision of some other of the numerous cases of litigated wills upon which we are soon to pass. Upon the principles just stated, I regard the requirements of our statute as to the execution and proof of wills as being merely the prescribed rules for the evidence, pronounced by law to be indispensably necessary to prove the disposing mind and will of the testator, and the authenticity of the testament; both of these being subjects peculiarly open to imposition, to artifice and error. The law, therefore, prescribes that "every last will and testament shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of a will at the request of the testator; and 5. The witnesses shall write opposite their names their respective places of residence:" 2 R. S. 64, sec. 40. This last requirement seems, however, not essential to the proof, but is enforced by a penalty for neglect.

Did, then, the testatrix, in the case before us, give the required evidence, by declaring the instrument signed and witnessed to be her last will and testament? This question involves the consideration of two points: one of law, the other of evidence. What is meant by the declaration required? Unless we resort to that artificial system of interpretation, by which any words may be made to mean anything, the word "declare" will be always found to signify distinctly, "to make known, to assert to others, to show forth;" and this in any manner, either

by words or by acts, in writing, or by signs. Thus, in our English Bible, we read: "Declare ye among the heathen, publish, conceal not;" an example at once and an explanation; the same idea being enforced and illustrated after the usage of the Hebrew parallelisms, in other words. So again of declaration by signs or other indications, it is said: "Ye are manifestly declared to be the epistle of God." It is useless to multiply examples, as all usage shows that "to declare" to a witness that the instrument subscribed was the testator's will, must mean "to make it at the time distinctly known to him by some assertion, or by clear assent in words or signs."

The history of this branch of the law, shows that the subject of positive external declaration must have been intended to be legislated upon in our revision of the statutes. The long series of decided cases upon the perpetually arising question, how far proof of the testator's knowledge that the paper signed by him was a will, was or was not sufficient without farther publication, proves incontestably that the minds of the revisers and of the revising legislature were called to the subject and all its distinctions and difficulties. Eminent judges (as Lord Hardwicke in *Ross v. Ewen*, 3 Atk. 161) had held that publication was essential to the execution of a will; and that "the mere written declaration in the instrument that it was a will was not sufficient;" whilst in other and later decisions, here and in England, it has been held with Lord Mansfield that "the witnesses need not know the contents, need not see the testator sign, that it was sufficient if he acknowledged his signature, for he may deliver it as a deed:" *Wyndham v. Chetwynd*, 1 Burr. 421.

The signing of papers purporting to be wills by persons near death, supposing that they signed some other instrument, was a danger such as demanded consideration whether it might not be excluded by positive legislation. I accordingly agree with the chancellor, that considering the explicit language of the statute in reference to the doubts under the former statutes, and in connection with the fact, that the legislature deliberately changed the language of those former acts, there can be no reasonable doubt that the law-makers meant to require an absolute publication at the time of the signing or acknowledgment. This legal and historical external evidence of the legislative intent corresponds with and supports the natural and obvious interpretation of the statute itself. When, therefore, it was determined that such a declaration should be made essential to the due proof of wills, as the necessary evidence of the testator's real

intent, it was expressly enacted that this declaration should be made to each attesting witness at the time of execution or acknowledgment. How, then, can this positive requirement be satisfied, except by the testator personally making the fact of his own understanding and intention known to the witnesses at the time by such express words or signs as could leave no doubt in their minds? This provision is just as imperative as that requiring two witnesses to the will, though otherwise a single one might ordinarily be sufficient. They are both of them strict rules, prescribed by precautionary policy for the government of those who alone can give the legal effect to the testament.

Here the evidence shows conclusively that the testatrix made no verbal declaration to the witnesses, did not cause them to read any written declaration, nor in any other way render it clear that she might not have thought the instrument signed and acknowledged was a deed or lease instead of a will. There was at the end of the instrument an attestation clause, setting forth in the customary form, that the testatrix "acknowledged to each witness that she subscribed the same and declared it to have been her last will and testament." This, if the witnesses had been asked to read it by the testatrix, or in her hearing, would have been a silent but clear declaration. But it was not read by them. The appellant's counsel maintained, that knowing the contents of the will and the concluding attesting clause, the testatrix, when she acknowledged her signature "for the purposes therein mentioned," made the declaration her own, as much as if she had distinctly repeated it; so that she virtually declared her signing to be for the purpose of authenticating her last will and testament. This might tend to show her intent, and if she had shown that clause to the witnesses, or had it read by another person, and assented to it, that would have been a declaration, a making known her will to the witnesses. But presuming the written attestation to have been correctly understood by the old lady, it was in fact merely a declaration, written to be made known thereafter to others, and not one made at the time to the witnesses.

With respect to the evidence necessary to prove a declaration, I do not doubt that the proved or acknowledged signatures of witnesses to a will, bearing above their names an attestation of the required declaration, must be good presumptive evidence of an actual declaration, and sufficient to prove the will if not refuted. Such would, of necessity, be the case upon the absence or death

of subscribing witnesses, and the proof of their handwriting by others, according to the statute. But in every case the clear probability must always be, that the witnesses would not have signed the attestation of due publication, had it not agreed with the fact, so that this must be the legal presumption until expressly contradicted. The mere absence of additional proof would not negative this presumption. Here, however, we have the testimony of the subscribing witnesses themselves, direct and positive, that they did not read this declaratory clause, and that nothing passed that could indicate any intent to inform them that they were witnessing a will, and not a deed or lease. The circumstance of the testatrix having directed the addition of the witnesses' residence to their names, tends to show her own knowledge of the character of the instrument (though not conclusively), but proves nothing as to any design of thus indirectly informing others that this was her will, since neither she nor they might know that this was the peculiar mode required by law for the attestation of wills.

In the absence of adverse testimony, the strong presumption of the truth of the written attestation being correct, when the signatures of the witnesses were acknowledged or proved, would establish the will. But that presumption is not like that in favor of a written contract binding the parties signing it, and shutting out contradictory parol testimony. It is, in itself, proof of no higher order than parol testimony, and as such, is subject to explanation or refutation, as much as receipts, certificates of the proof of deeds, and similar written documents, which are in themselves *prima facie*, satisfactory proof: 1 R. S. 759.

This, therefore, is incontestably a case where the open evidence of knowledge and intent, demanded by our law, in order to exclude the possibility of delusion or deception, and to authenticate wills, has not been furnished. The will has, therefore, not been proved according to law, any more than if it had but a single witness; and the estate must pass under the general laws of descent and distribution. I place my opinion exclusively upon this ground. The intimation of actual deception, made in argument and countenanced in the chancellor's opinion, is not to my understanding, supported by proof or probability sufficient to authorize the impeachment of the witnesses or the legatees. The naked fact of a testatrix preferring those relations or descendants with whom she resides, to others at a distance, rather tends to support the will than to invalidate it; and at any rate ought not to expose any one to the imputation of criminal arti-

fice. The only effect of this part of the evidence on my mind, was to show the possibility of such a deception, and thus to support the policy of our legislation and strengthen the reasons for its strict judicial application.

On the question being put, Shall this decree be reversed? all the members of the court present at the argument of the case answered in the negative. Whereupon the decree of the chancellor was affirmed.

PUBLICATION OF WILL, NECESSITY AND SUFFICIENCY OF: See *Swett v. Boardman*, 2 Am. Dec. 16; *Small v. Small*, 16 Id. 253; *Higdon's Will*, 22 Id. 84; *Dewey v. Dewey*, 35 Id. 367. See also the note to *Guthrie v. Owen*, 36 Id. 316. To the point that any communication, by words or otherwise, by the testator to the witnesses to a will indicating an intention to give effect to the paper as a will, is a sufficient publication, the principal case is cited in *Doe v. Rue*, 2 Barb. 203; *Seguine v. Seguine*, Id. 393; *Whitbeck v. Patterson*, 10 Id. 611; *Torry v. Bowen*, 15 Id. 305; *Nipper v. Groesbeck*, 22 Id. 671; *Simmons v. Simmons*, 28 Id. 77; *Trustees v. Calhoun*, 38 Id. 160; *Thompson v. Leastedt*, 3 Hun, 395; S. C., 6 F. & C. 80; *Gilbert v. Knox*, 52 N. Y. 130; *Thompson v. Stevens*, 62 Id. 635; *Van Hooser v. Van Hooser*, 1 Redf. 368; *Brown v. De Selding*, 4 Sandf. 16.

MERE WANT OF RECOLLECTION OF WITNESSES to a will is not fatal where it is properly signed and attested and there is other evidence to show that at the time the testator called the paper his will and requested the witnesses to attest it: *Dewey v. Dewey*, 35 Am. Dec. 367. The doctrine laid down by the chief justice in the principal case to the effect that if the attestation clause is in proper form, and shows publication and other requisites to due execution, the will is not invalid although the witnesses have forgotten the facts, is approved in *Lewis v. Lewis*, 13 Barb. 26; S. C., in court of appeals, 11 N. Y. 224; *Cheaney v. Arnold*, 18 Barb. 438; *Weir v. Fitzgerald*, 2 Bradf. 73; *Von Hoffman v. Ward*, 4 Redf. 260; *Grant v. Grant*, 1 Sandf. Ch. 240; *Brown v. Clark*, 77 N. Y. 372.

EXECUTION AND ATTESTATION OF WILLS GENERALLY: See *Dewey v. Dewey*, 35 Am. Dec. 367, and note citing other cases in this series. See also the note to *Guthrie v. Owen*, 36 Id. 316. The principal case is the leading New York decision as to what constitutes due execution and attestation of a will under the statutes of that state. It is cited as to what is a sufficient compliance with the requisites of the statute in *Heady's Will*, 15 Abb. Pr. N. S. 218; *Butler v. Benson*, 1 Barb. 530; *Morris v. Kniffin*, 37 Id. 340, 341; *Chaffee v. Baptist etc. Convention*, 10 Paige Ch. 92; *Robinson v. Smith*, 13 Abb. Pr. 363; *Baskin v. Baskin*, 36 N. Y. 421.

MCLAREN v. WATSON'S EXECUTORS.

[26 WENDELL, 425.]

TO MAKE GUARANTY NEGOTIABLE AS PART OF NOTE to which it relates, it must be on the note itself, or annexed to it, in the nature of *un allonge*. GENERAL GUARANTY OF NEGOTIABLE NOTE BY SEPARATE AND DISTINCT INSTRUMENT, containing no words of negotiability, is not negotiable, and can not be sued on by an assignee of the note and guaranty, in his own name.

ERROR from the supreme court in an action of assumpsit on a guaranty executed by the defendants' testator, the nature of which is stated in the opinion of the chancellor, the plaintiff being an assignee of the guaranty and the note to which it referred. Plea, *non assumpsit*. The principal defense was that the guaranty was not negotiable, and that the plaintiff, therefore, could not sue thereon. Another defense was that the note and guaranty were taken by plaintiff's assignor, one Frye, on a loan of money made in consideration of the note and guaranty being put into his hands for collection in violation of the act of 1818, the said Frye being a practicing attorney, and that therefore the said note and guaranty were void in the plaintiff's hands. Verdict and judgment for the defendant, and the plaintiff brought error. The action was originally brought against the defendants' testator in person, but upon his death after the writ of error was sued out, his executors were substituted as defendants in error.

W. Kent, for the plaintiff in error.

C. O'Connor, for the defendants in error.

By WALWORTH, Chancellor. The testator in this case, by a separate and distinct instrument, which contained no words of negotiability, and was not indorsed or written upon the note, guaranteed the payment of a note at sixty days, drawn by W. A. Blackney and E. C. Blackney, payable to the order of W. Watson of New Milford, W. Watson of Pearl street, and D. S. Tuthill, for three hundred dollars: which guaranty, as the plaintiff alleges, was executed for the purpose of enabling one of the indorsers of the note to raise money thereon from D. M. Frye. Frye, who held the note and guaranty when the note became due and payable, or rather the guaranty and a note not correctly described in such guaranty, finding that the validity of his title to the note would be disputed, transferred the note and the guaranty to the plaintiff McLaren, who sued the personal representatives of the guarantor, in his own name, to enable him to use Frye as a witness to disprove the defense which it was anticipated would be set up.

Several questions were raised upon the argument, which I have not thought necessary to notice, as I am perfectly well satisfied that the objection that this separate guaranty was not negotiable, so as to authorize the assignee to bring a suit thereon in his own name, is well taken. A guaranty indorsed upon a negotiable note, whereby the guarantor agrees with the holder

of the note that he will be answerable that the note shall be paid to him or to his order, or the bearer thereof, when it becomes due, is probably negotiable by the transfer of the note upon which it is written; for it is in fact a special indorsement of the note, or more properly a negotiable note in itself. But to make a guaranty negotiable as a part of the note to which it relates, it must be on the note itself, or at least it must be annexed to it: in the nature of *un allonge* or eking out of the paper upon which the note is written.

There is a mercantile guaranty, recognized by the codes of commerce, both of France and Spain, called an *aval*, by which the payment of a bill of exchange may be guaranteed. When the form of the *aval* is such that it can operate as a general indorsement, it will pass to any subsequent indorsee or holder of the bill, in the same manner as if it was an indorsement on the bill itself; but when it is restricted in its terms, as in the case of an indorsement filled up without words of negotiability, it can only be sued by the person to whom it is given: Code of Com. of France, Rod. Transl., B. 1, art. 142; Code of Com. of Spain, in French, by Foucher, p. 165, tit. 1, sec. 6, arts. 477, 478. But to make the guarantor liable in those cases the same protests and notices are necessary as in the case of a real indorser: Crivelli's Dict. Du Droit, tit. Aval. That species of negotiable mercantile guaranty, is not even co-extensive with those countries where the civil law prevails; for in the case of *Cooley v. Lawrence*, 4 Martin, 640, the supreme court of Louisiana held that a guaranty of that nature was not known to the laws of that state, but must be governed by the rules of other special contracts. See also, 3 Martin (N. S.) 659;¹ 10 La. 374.² And Mr. Bell, the distinguished commentator on the commercial law of Scotland, where the civil law also prevails, distinctly expresses the opinion that the separate guaranty of a bill or note is not negotiable so as to authorize a subsequent holder to sue on it in his own name: 1 Bell's Comm. on Com. Law of Scotland, 376.

There is nothing in the particular circumstances of this case, which can justify the court in overturning the established principles of law relative to the negotiability of written instruments, for the purpose of enabling the real party to the litigation to sell his interest to a third person, and to become a witness to support the claim. And as I have no doubt as to the correctness of

1. *Guldrey v. Vices.*

2. *Smith v. Gorton.*

the decision of the court below, upon the question I have thus examined, I shall vote to affirm the judgment.

VERPLANCK, Senator, delivered an opinion in favor of reversing the judgment of the supreme court. The chief points relied on by him to sustain the action are given in the following synopsis:

1. The taking of the note and guaranty by Frye was not in violation of the act of 1818, although Frye was a practicing attorney, because it came within the exception in that act in favor of paper taken "in payment of a debt antecedently contracted," or, in part at least, as collateral security for such a debt, for, as appeared from Frye's testimony, to which the verdict shows that the jury gave credit, there was a prior debt of one hundred dollars and a new loan of two hundred dollars; for all of which the note and guaranty were taken as collateral security, there being an express understanding and stipulation at the time that the borrower was to have the right to pay the whole amount and take up the note before it became due and receive back his security. Such an agreement was wholly inconsistent with the idea of an absolute purchase of the note and guaranty, or of a loan made in consideration of, or as inducement for placing the note in Frye's hands for collection, within the purview of the act referred to.

2. The principal question, however, is as to whether or not the guaranty is of such a nature that the plaintiff, as assignee, can sue upon it in his own name. The guaranty is general in its terms, not being a stipulation with any person named. The supreme court intimate an opinion that if the guaranty had been written on the note it might have been treated as a mere indorsement by striking out all but the name of the guarantor, but that a separate guaranty did not, like an indorsement, run with the note, but must be limited to the immediate parties, like other choses in action. But such a distinction is expressly contrary to *L'Amoreaux v. Hewit*, 5 Wend. 307, where it was held that an indorsed guaranty could not be treated as a mere indorsement, but was a special contract with the first taker just the same as if written on a separate paper.

What is the real undertaking or promise of a guarantor? A guaranty is essentially a warranty of some act or debt of another, an undertaking that another shall perform his contract, the latter at the same time remaining liable for his own default. The warranty may be either of a prior or of a future debt or contract. If the former, there must be some good consideration received by the guarantor; if the latter, the giving of credit to

the person whose debt or contract is guaranteed upon the faith of the engagement of secondary liability held out by the guarantor is sufficient consideration of itself to support the guaranty, upon the familiar principle that consideration for a promise may consist either in actual benefit to the promisor, or in some prejudice, suspension of right, or possibility of loss to the party accepting the promise: 3 Burr, 1663;¹ 1 Wms. Saunders, 211, note 2; *Jones v. Ashburnham*, 4 East, 455; 12 Wend. 381.²

A contract of guaranty may, like other contracts, be made with the person specifically named to be answerable for another, and if accepted by the person to whom it is addressed is not negotiable, but can be enforced only by that person. On the other hand, it may be a general guaranty without naming any particular person to whom it is addressed. In the case of other contracts, as where an offer is made by public advertisement to pay a certain price for goods of a certain kind delivered at a certain time and place, a general offer may be made which, when accepted, becomes a contract with the person who accepts it: *Cobham v. Upcott*, 5 Vin. Abr. 527, cited in *Fell on Guaranties*, 44. The same rule applies to a general offer of guaranty of the debts or contracts of another, as is shown by the authorities: *Phillips v. Bateman*, 16 East, 356; *Walton v. Dodson*, 3 Car. & P. 163; *Bradley v. Cary*, 3 Greenl. 233.³ The undertaking of guaranty in such case, though general in offer, becomes, when accepted, binding between the guarantor and the person acting upon the faith of the guaranty. But such a guaranty, notwithstanding its acceptance, unless made negotiable by statute or by the custom of merchants, can be enforced only in the name of the direct party to the contract.

There is a distinction, however, between an ordinary commercial guaranty, as of a credit for goods purchased, and a guaranty of a negotiable bill or note. In the former case the guaranty is of some specific debt or debts not negotiable in the hands of the creditor, and which he can not pass away to another. As the primary liability, therefore, can go no further than the first parties, there is no promise by the guarantor of such liability to any person giving a subsequent credit. But from the nature of negotiable paper it is evident that a general guaranty of such paper is a positive promise or undertaking to become liable, for the original promisor's default in its payment, to any person who may become the holder of it on the faith of such guaranty. The promise is to subsequent indorsees as well as to the first

1. *Phillips v. Van Mierop*.

2. *Seaman v. Seaman*.

3. 3 Greenl. 234.

holder. The general offer of guaranty in such cases is an offer of an indefinite number of successive guaranties. Though the guaranty may not be negotiable in itself, it is a collateral promise to each person who may in turn give credit to the note so guaranteed; but no one can have a ground of action on the guaranty who, after having become a party to the contract, parts with the note. The promise of the guarantor is in effect as follows: "I promise to any person who may, upon the faith of this promise, become, by purchase, discount, or otherwise, the *bona fide* holder of this note, to pay the same in case of its not being duly paid when at maturity."

The consideration of such guaranty may be one of direct benefit to the guarantor, or it may be merely the value of the note paid at his request and on his credit to the person for whose benefit the note was made. The latter was the case in this instance. It is not necessary to the validity of such a guaranty that the consideration should be expressed in it as required by the statute, in other cases of guaranty, because the promise is not collateral but independent. It is a new contract upon which the plaintiff in the present case took the note, and his exposure to loss is sufficient consideration to support it. The only authority really opposed to the view here taken is *L'Amoreaux v. Hewit*,¹ before cited. Other cases apparently adverse are those where the guaranty is not general, but is a special agreement with a person or persons specifically mentioned, as in *Barrington's case*, 2 Sch. & Lef. 113. An analogous case to the present would be one where a well-known capitalist, in consideration of ample security and a commission, should by public advertisement guaranty the bills of a bank of doubtful credit. Such a guaranty would be binding when accepted, as was said in *Phillips v. Bateman*, 16 East, 355, and would go with each bill of the bank as it passed from hand to hand.

The opinion here expressed is supported by another view of the law, though it is not rested upon it: The "custom of merchants" as to bills of exchange is not merely the local usage of England; it is the usage of the whole commercial world. It passed over from the continent to England with the extension of commerce. Hence continental writers on this subject, such as Pothier, are cited and recognized as authorities in England. Though the practice of general profers or undertakings of guaranty of negotiable paper, intended to accompany the paper, is not very common in Eng-

1. 5 Wend. 307.

land, it is well known on the continent of Europe. This guaranty, called by the French *aval*, and by the German civilians *avallum*, is given either by indorsement on the bill or by a separate writing. By the French code the guarantor is bound in the same way as the drawer and indorser: Code de Commerce, liv. 1, tit. 8, secs. 141, 142. The same law exists in Belgium, Holland, generally in Italy, and in Germany. Pothier says that the guaranty may be either special or general, the latter giving the holder the same right of action that any party may have against the drawer. The strict form, he says, is to write it on the bill itself, but it is commonly made by a separate writing: Pothier, *Contrat du Change*, pt. 2, sec. 50. The same usage and legal rule prevail in Scotland: 1 Bell's Com. 376. This custom has probably passed over to New York from our early Dutch colonists, or from Scotch and French merchants settled among us. At any rate, a custom of general and indefinite guaranty of commercial paper, either on the paper itself or on a paper referring to it, is well known among the business men of New York, and it is with the understanding that the guaranty passes with the note.

As to one other point in the argument it is sufficient to say, that the guarantor does not stand in the place of an indorser, and that demand and notice are not necessary to charge the former. The guarantor's undertaking is not conditional, but absolute, that the maker shall pay the note when due, or that the guarantor will pay it: *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]. An absolute guaranty waives demand and notice of non-payment: *Breed v. Hillhouse*, 7 Conn. 528; 2 Kent's Com. 124.

I have seen a case decided in the supreme court since this opinion was prepared, which seems to me to support the opinion at which I have arrived in this case: *Kitchell v. Burns*, 24 Wend. 456. That was a case of guaranty on a note payable to S. or bearer, and the guaranty was of payment to S. or bearer. The guaranty was held good in the hands of a subsequent holder, and negotiable of itself, not as a mere indorsement, striking out the guaranty. There can be no difference between a promise of guaranty to the future bearer of a note payable to bearer, and the same promise to the future holder of a note payable to order.

An affirmance of the decision of the supreme court in this case would leave the law unsettled and contradictory, while a reversal of that decision, and the establishment of a general rule that a guaranty of negotiable paper in any form may be en-

forced by any one taking the paper on the faith of it, will simplify and harmonize the law.

By BRADISH, President of the Senate. Although several points of minor importance have been made in the progress of this case, the main question presented for the consideration and decision of this court, is whether a separate guaranty of the payment of a promissory note can be made so negotiable as to run along with the note, and be available, in his own name, in the hands of any holder of the note, other than the party to whom the guaranty was originally given? This question, although of considerable general importance, is of peculiar interest to a commercial community. The transfer, from hand to hand, of negotiable paper, with their various collateral guaranties, enters so constantly into the hourly transactions of commerce, that it is of great importance that the law determining the precise character and effect of these, should be well settled and well known. Indeed, in no department of human affairs are fixedness, uniformity, and general knowledge of the laws so important and necessary, as in the various operations of trade and commerce. Merchants contract with reference to the laws. Their rights and their obligations are determined by them. It is all important, therefore, that those laws should be fixed and known. This is not more essential to the safety than it is to the prosperity of commerce; and should be kept steadily in view in the legislation and judicial proceedings of every enlightened government that would foster and protect its foreign and inland trade.

In all ages of the world it has been the policy of all civilized nations to treat commerce with great favor and regard. Its advancement and protection have been the object of public treaties; while its usages have constituted no inconsiderable part of municipal and international law. So great has been the deference paid to the custom of merchants, that it has not only been received as law in itself, but has even been permitted to modify the common law of the land. In England so early as the reign of James I., Chief Justice Hobart declared the custom of merchants to be a part of the common law, of which the judges ought to take notice: *Vanheath v. Turner*, Winch. 24; and Lord Coke, in his 2 Institutes, p. 404, speaking of the *Lex Mercatoria*, says, "which, as hath been said, is part of the laws of this realm."

It is a general rule of the common law, that choses in action are not negotiable. But so early as the fourteenth century, in conformity with the custom of merchants, and for the benefit of

trade, an exception was made to this general rule in favor of foreign bills of exchange; and in the seventeenth century a similar exception was made in favor of inland bills. Promissory notes, from the same influence and with the same view, to the encouragement of trade, came very soon to enjoy the same favor, and be invested with the same general characteristics. They continued to be so considered and so treated until their character was drawn in question by Lord Chief Justice Holt, in the case of *Clerk v. Martin*, in 1702: 2 Ld. Raym. 757, and 1 Salk. 129. He denied that a promissory note, by the custom of merchants, had the character of an inland bill of exchange; or that an action of debt could be maintained upon it as such. The several cases of *Potter v. Pearson*, 2 Ld. Raym. 759; *Burton v. Souther*, Id. 774; *Williams v. Cutting*, Id. 825; and *Buller v. Crips*, in 1703, 6 Mod. 29, followed that of *Clerk v. Martin*, and adopted its doctrine. In the latter case, however, the court adjourned without coming to any decision. What, therefore, would have been its judgment, in that case, was at the time considered doubtful. These doubts as to what was the law upon this subject, whether originating in Lord Holt's excited controversy with the goldsmiths of Lombard street, or in calm and deliberate judgment, is immaterial, they led to the enactment of the statute of 3 and 4 Ann. Without here stopping to consider the much agitated question, whether this statute was the enactment of new law, or merely declaratory of that which had before existed, but which had been drawn into doubt by recent decisions, it is sufficient that, so far as regards promissory notes, it was substantially re-enacted by the legislature of this state in 1788. It was revised and simplified in 1801; and again revised and incorporated in the revised statutes of 1830. It has since continued, and is now the law of this state.

The question here arises, whether this guaranty, written on a separate piece of paper, can be brought within the provisions of this statute, so as to make it negotiable and enable the holder of the note and guaranty to bring an action on the latter in his own name? It is certain that the guaranty is not in terms embraced within the statute; and it would, in my judgment, be most dangerous to extend the equity of the statute so far as to include this case within its undefinable limits. Waiving then, as before, the question whether the statute be the enactment of new, or merely the declaring of the old law; and even admitting the latter, let us inquire whether that custom of merchants, which, for the benefit of trade, made the promissory note nego-

tiabile, can, for the same purpose, be made to apply, with like effect, to the separate guaranty of such promissory note? It is believed that no such custom of merchants has ever existed, or does now exist, in this or any other country; and on the contrary, in adopting the doctrine advanced on the part of the plaintiff in error in this case, this court would be carrying the law on this subject one step beyond the legislation or known and acknowledged custom of merchants in any country. It is true, that the commercial codes of France and Spain and the edicts of some of the German states, do recognize as negotiable a separate guaranty of promissory notes and bills of exchange. These separate guaranties are called, in the two former countries, *aval*, and in the latter *avallum*. But in their character and effect, they are to all intents and purposes indorsements. They give the same rights and impose the same obligations. To charge him who has given the *aval* or *avallum*, the same notice of demand and non-payment is necessary. The French code is as follows: "Le donneur d'aval est tenu solidairement, et par les mêmes voir que les tireurs et endorser, sauf les conventions différentes des parties:" Tom. 1, tit. 8, sec. 8, art. 42. The Spanish code declares: "Si l'aval est conçu en termes généraux, et sans restriction, celui qui le fournit répond du paiement de la lettre, de la même manière et dans les mêmes formes que la personne dont il se rend garant:" Sec. 6, art. 478. It will thus be perceived that the *aval*, whether on the note or bill itself, or a separate piece of paper, and it may be either, is in effect an indorsement, giving the same rights and imposing the same and no other obligations; whereas the guaranty, under our laws, is a special and absolute contract for the payment of the note or bill, waiving the right to notice of demand and non-payment, by the maker or acceptor. In adopting the doctrine contended for, therefore, this court, while it would impose upon the guarantor all the obligations of an indorser or one who gives an *aval*, would deprive him of the important right to notice, enjoyed by the two latter, and often essential to the safety of the party entering into such obligations. The court would thus, as before remarked, carry the law upon this subject one step beyond the legislation of any country, or any known custom of merchants. It would, in short, be new law, and for its establishment would require the exercise of legislative rather than of judicial power. Hitherto the courts of this state have wisely, I think, adhered to the general rule, that to charge a party as an indorser of negotiable paper, his name, or the name of his firm, must be written upon the paper itself, or *un allonge*. A sepa-

rate guaranty of such paper has been considered only as a special contract, not negotiable, and of course available in his own name only by the party to whom it was originally given.

Our courts have recognized as good, indorsements on negotiable paper in the form of a guaranty and in terms, negotiable, being to order or bearer, but on the ground that these were in effect new bills, and, therefore, valid as such, and not merely as guaranties of the original paper so indorsed. This was the recent case of *Ketchell v. Burns*, 24 Wend. 456, and of other previous cases.

It is true our statutes do, as the law did before, authorize a separate acceptance of a bill of exchange. If in this provision of the statute, and in the interests of commerce, a reason is supposed to exist equally applicable to a separate indorsement or guaranty of the payment of negotiable paper, let the aid of the legislature be invoked to give that provision such extension. This court has no power to do so, even if it were universally admitted to be desirable. What would be wise or desirable law is one thing; what is actually the law may be another and a very different thing. While the former regards exclusively the legislature, the judiciary can be governed only by the latter. In this case, therefore, concurring fully in the judgment of the supreme court, and in the satisfactory reasons given for that judgment in the opinion of Justice Cowen, I shall vote for an affirmance.

On the question being put, Shall this judgment be reversed? three members of the court answered in the affirmative, and twelve in the negative. Whereupon the judgment of the supreme court was affirmed.

GUARANTY, NEGOTIABILITY OF.—That a guaranty to a particular person of the collectibility of a negotiable note, indorsed on the note, is a contract between the immediate parties to it, is a point to which the principal case is cited in *Van Derveer v. Wright*, 6 Barb. 550. So a guaranty of a bond to "the present owner and holder" is personal, and only the party to whom it is given can sue thereon: *Smith v. Starr*, 4 Hun, 125; S. C., 6 T. & C. 389. So a guaranty of a note or bill by a separate instrument is not negotiable: *Barlow v. Myers*, 64 N. Y. 45. But a general guaranty indorsed upon a note passes with it: *Cooper v. Dedrick*, 22 Barb. 518; *Webster v. Cobb*, 17 Ill. 466. So a general guaranty of collectibility indorsed on a bond: *Cady v. Sheldon*, 38 Barb. 116. In *Tinker v. McCauley*, 3 Mich. 194, a general guaranty indorsed on a note payable to bearer was held not to be negotiable. The principal case is cited as authority in all the above-mentioned decisions. It is cited generally as to what constitutes a negotiable instrument in *Birckhead v. Brown*, 5 Hill, 643, and *Van Alstyne v. Van Slyck*, 10 Barb. 386.

THAT GUARANTY ON NEGOTIABLE NOTE IS AN ORIGINAL undertaking upon which the guarantor is liable as upon a promissory note, is a point to which the principal case is cited in *Manrow v. Durham*, 3 Hill, 585, and *Ellis v. Brown*, 6 Barb. 298.

LYON v. JEROME.

[26 WENDELL, 485.]

AUTHORITY CONFIDED TO JUDGMENT AND DISCRETION OF AGENT, whether private or public, imports personal trust and confidence, and can not be subdelegated by such agent.

CANAL COMMISSIONERS CAN NOT DELEGATE to an engineer or other subordinate the authority conferred upon them by statute to enter upon lands of citizens and take and use their property "as they may think proper" in constructing the canal, that authority being discretionary in its nature; and an engineer entering upon land and taking materials for the construction of the canal without the express direction of the commissioners is liable in trespass.

ERROR from the supreme court in an action of trespass for entering and taking certain stone from the plaintiff's quarry. The defendant justified on the ground that he was chief engineer of the Oswego canal, and took the stone to be used in constructing the canal under the authority conferred by statute upon the canal commissioners. It appeared that the taking was not expressly authorized by Mr. Seymour, the commissioner in charge of the work; and, although he saw the work as it progressed, he testified that he did not know that the stone was taken from the plaintiff's land, but supposed it was taken from land of parties who had consented thereto, or from state lands, but that he would have sanctioned the taking if the engineer had represented it to be necessary. Verdict for the plaintiff, a motion for a nonsuit having been overruled. The defendant moved for a new trial which was denied by Denio, J., the circuit judge, on the ground that the authority conferred by statute upon the canal commissioners was personal and could not be delegated, and as the taking had not been expressly authorized by them or either of them, there was no justification, though the taking might have been necessary for the construction of the work and though the defendant acted in good faith. His honor's reasoning was substantially the same as that of the opinions delivered in the court of errors. The supreme court, however, granted a new trial, 15 Wend. 570, and under their decision the circuit judge directed a nonsuit, which the supreme court refused to set aside, and the plaintiff brought error.

S. Stevens, for the plaintiff.

J. A. Spencer, for the defendant.

By **WALWORTH**, Chancellor. In my opinion there should be a reversal of the judgment of the supreme court, for the reasons

assigned by the circuit judge, on his refusal to grant a new trial. If the commissioners had the right to enter upon the premises of the plaintiff and take the stone, it does not follow that their agents had the same right. Mere executive or ministerial powers may be subdelegated, but not judicial or discretionary powers. Here the engineer acted even without the knowledge of the commissioner, for the reasonable inference from the testimony of the latter is, that he did not know that the plaintiff's property had been taken. On this ground, therefore, I shall vote for a reversal of the judgment of the supreme court.

I have serious doubts also as to the constitutionality of the acts of the legislature under which the property of the plaintiff was taken, no provision having been made whereby the owner of the property might compel the payment of his damages or insure the compensation to which he was entitled. By the act of 1817, the officers of the state were authorized to enter upon the lands of individuals in the prosecution of their duties for purposes other than that of taking property. By the act of 1820, they may enter upon private property to obtain materials for the purposes of repair; but they are not authorized temporarily to occupy the lands of individuals, in the construction of the public works, and then leave the owners of the property to obtain compensation in the best way they can; and yet such was the law until a subsequent provision was made in the revised statutes on the subject. I held in *Bloodgood v. The Mohawk and Hudson R. R. Company*, 18 Wend. 17 [31 Am. Dec. 313], and am still of the same opinion, that before the legislature can authorize the agents of the state, and others, to enter upon and occupy, or destroy, or materially injure the private property of an individual, except in cases of actual necessity, which will not admit of delay, an adequate and certain remedy must be provided, whereby the owner of such property may compel the payment of his damages or compensation. No such provision having been made in the act of 1817, nor in the act for the construction of the Oswego canal, I should be inclined on this ground also to reverse the judgment in this case.

By VERPLANCK, Senator. This case, as argued before us and in the court below, turns exclusively upon the single and very interesting question of the authority of an inferior officer on our public works, to exercise by virtue of an express or implied delegation a power vested by statute in the canal commissioners. By the act of 1817, relating to the Erie and Champlain canals,

and the subsequent laws, extending its provisions to the construction of the Oswego canal, it was made "lawful for the canal commissioners and each of them, by themselves, and by any agent or engineer employed by them, to enter upon, take possession of, and use all and singular any lands, waters, and streams necessary for the prosecution of the improvement, and to make all such canals, feeders, locks, etc., as they may think proper for making such improvements," etc. Thus a large discretionary power is given to enter upon the lands of any citizen and to take and use such of his property as may be thought proper. The authority is given to the canal commissioners jointly or severally, to be exercised in their discretion, through any proper agent.

In all cases of delegated authority, where the delegation indicates any personal trust or confidence reposed in the agent, and especially where such personal trust is implied by making the exercise and application of the power subject to the judgment or discretion of the agent or attorney, the general rule is, that these are purely personal authorities, incapable of being again delegated to another, unless a special power of substitution be added. From an early period of our law, this rule has been laid down as to powers given by will or deed to executors, trustees, and attorneys, to sell lands, make leases, etc.; and modern decisions have extended the principle to the less formal appointments of factors, brokers, and other commercial agents. How much more strongly then must the reason and policy of the rule apply to the delegation of authority by the state, to its high public officers, made with the solemnity of a legislative act? The language of the statute, as well as the nature of the trust itself, shows that this is an authority confided to the judgment and discretion of the commissioners themselves, for the impartial discharge of which they are responsible to the state.

In this instance, as in similar cases of authority to represent private individuals, the person thus intrusted may have occasion to depend upon scientific or professional advice for the guidance of his own judgment. He may even in matters out of the scope of his own information, rely entirely upon the authority of his adviser or assistant. Yet he is still bound to form a judgment for himself, and to assume its responsibility. In this case there was no exercise of any judgment or discretion whatever by the commissioners; there was merely such a general reliance on the supervision and judgment of the engineer, as might amount to an implied delegation of authority, had the commissioner been

authorized by law to make such a substitution. But, as the circuit judges before whom the case was tried, well stated it, "it is the judgment of the commissioners, or one of them, which is to determine the propriety of the entry, and not that of the agents," etc. "Such is the obvious construction of the statute. A contrary construction would be unreasonable and extravagant. The power conferred is one of the most important character; nothing less than taking of the property of a citizen without his consent. Yet, by the construction contended for, this is conferred upon any and every engineer, superintendent, and agent, whom the commissioners may employ, down to the chain-bearers." Judge Denio has, in his opinion on the motion for a new trial, fully examined the statutes bearing on this subject: and to these views, as well as to those expressed upon the general merits of the case, I can add nothing. I fully concur with his opinion here, as I have repeatedly done on other occasions when it has been my lot to support the decisions of that able judge at circuit, or as vice-chancellor, against those of higher tribunals.

I have only to add, that it is of the greatest public importance to establish the general rule of agency, that "delegated authority can not be delegated again, without special power so to do," as governing the official powers, acts, and contracts of our state officers. If there be any inconvenience in the strict construction of the statutes as to the canal commissioners, who must so frequently act upon the advice and authority of engineers, that inconvenience can be easily remedied by legislation (as indeed it appears to have been partially done as to repairs), which can vest the authority to exercise the power of the state in some designated subordinate officer, or prescribe the mode in which any special power may be delegated. But when we consider what large discretionary powers are frequently vested in our state officers, and especially in the comptroller, in respect to the great pecuniary concerns of the state, its loans, deposits, contracts, etc., we can not but perceive the immense hazards to which they will be exposed, if these powers can be exercised so as to bind the state by any subdelegation, express or implied, not authorized by the letter of the statute. If we once depart from the safe and just rule, established by old authorities and frequent decisions in cases of private right, we may hereafter expose great public interests to be sacrificed by the acts of clerks, brokers, or agents, exercising the authority of our state officers, under some loose discretionary delegation, perhaps extended by usage and implication. If, unhappily, such a case should hereafter arise,

the assertion and application of the old common law principle, either legislatively or judicially, after having once set it aside, might be then hard and inequitable, and would certainly subject the state to censure and odium. For this reason, especially as it is quite evident that this court agrees with this view of the law of the case, I am anxious that our present decision should stand as a strong and clear precedent upon this ground alone, unconnected with any other question which may hereafter leave a doubt as to the precise principle settled.

The chancellor, whilst agreeing that the discretionary power is given by statute to the canal commissioners, and can not be delegated to another, has suggested another ground for reversal. I understand it to be this: that as the acts which regulated the construction of the work, for which the stone was taken and the illegal entry made, do not provide for the compensation of the owner in such cases, the taking will fall within the prohibition of the constitution, declaring that "private property shall not be taken for public use without just compensation." This involves not only the right interpretation of a great constitutional provision, but also that of two or more legislative acts. It may perhaps be doubted, whether the constitutional provision intends anything more than to prescribe to the legislature the duty of providing for such compensation in some way or other: either before granting authority to take private property, or after it is granted. It may, on the other hand, be held to require that the private right should not be divested, until just compensation had been actually made or tendered, so that a mere provision by law for obtaining compensation would not be sufficient. My own strong conviction of the great republican duty of supporting private rights against public power, would incline me to concur in the opinion expressed by the chancellor. But we are not now advised, as a court—scarcely any of us as individuals—of the decisions or reasoning of our own state courts, bearing on this point; nor of those of the courts of the United States, if there be any upon the similar provision in the constitution of the United States. Neither is it by any means clear, that some of the acts in force at the period of the construction of the Oswego canal, did not provide sufficient means of compensation in such cases. The chief justice intimates that a just and reasonable construction of those acts would justify the canal appraisers in allowing a claim for damages. Neither the constitutional point, nor that of the interpretation of these statutes, were raised at the trial or in the supreme court. They have not

been examined in the able and lucid argument of the case before us, by eminent counsel, nor have they been presented to us on their points, nor have we been furnished with such references to the authorities as might enlighten our conclusions. I must, therefore, decidedly protest against any judicial expression of opinion, which will place our reversal of the judgment of the supreme court upon reasons which have not been examined nor discussed in the argument before us.

The most learned and venerable of all judicial authorities, has given an impressive testimony to the necessity of legal argument in cases of doubt and difference, for the guidance of the most experienced judges, and has ascribed to it a weight and efficacy beyond the reach of unassisted human reason. That aid is peculiarly required in our court. When a question has been "eviscerated" (to use the strong expression of a lay member of the appellate court of Great Britain), by the previous examination of the courts below; by the selection of the special points of appeal; by the collection of authorities, and by the arguments of counsel, this court may arrive at the soundest conclusions more slowly indeed, but more surely than the learned tribunals whose decisions, made under the overwhelming press of business, we are called upon deliberately to review. Without that aid, in some form or degree, we are probably more liable to err than other courts. Under this conviction, many of us concur in placing our decision of reversal exclusively upon the reasons and grounds so fully and ably argued before us.

By BRADISH, President of the Senate. This was an action of trespass for breaking the plaintiff's close, and taking and carrying away stone from his quarry for the construction of three locks on the Oswego canal. The defense was, that Jerome was the principal engineer on that work, and as such, was authorized to perform the acts complained of as a trespass. This case, therefore, involves the important subject of the powers and liabilities of public officers, in the discharge of their official duties. These, in the present instance are: 1. Either derived from the general or special law, applicable to the case; 2. Or result from the nature of the office itself.

The statute of 1834, c. 279, sec. 1, directing the construction of the Oswego canal, refers to the third section of that of 1817, in relation to the Erie and Champlain canals, for the powers and duties of the canal commissioner, and all subordinate officers and agents to be employed on the work in question. That section gives to the canal commissioner, and, I think, to

him exclusively, the important judicial power of determining, in all cases, the necessity and expediency of appropriating the lands or property of individual citizens to the public use, in the construction of the work in question. This is an exceedingly delicate and important power, and only exists in the state by virtue of her right of eminent domain as sovereign. In expressly granting this power, a confidence in the grantee of the power as to its exercise is implied. It can not, therefore, be delegated. It must be exercised by the grantee in person, and not by proxy or substitute. The commissioner can act by others. He must judge himself. He only can decide upon the necessity or expediency in any case of appropriating private property to public use; but he may employ his subordinate officers or agents to carry such decision into effect. Such, I think, is the fair interpretation as well of the special as of the general law applicable to this case; so also are the authorities: See statutes of 1817, c. 263, sec. 3; statutes of 1820, c. 202, sec. 3; 1 R. S. 220, secs. 15, 16; *Vanderheyden v. Young*, 11 Johns. 150; *Rogers and Magee v. Bradshaw*, 20 Id. 735; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Jerome v. Ross*, 7 Johns. Ch. 315 [11 Am. Dec. 484]; *Wheelock v. Young and Pratt*, 4 Wend. 647.

From the record it does not appear that Mr. Seymour, the canal commissioner, having charge of this public work, had directed the appropriation of the materials in question to the public use; or determined the necessity or propriety of such appropriation. Nor does it appear that the defendant had any authority to make the appropriation in question, derived either from any general or special directions of the canal commissioner to that effect; on the contrary, it does appear that the commissioner expressly directed the stone for the work in question to be taken from the quarry belonging to the state. It is undoubtedly true, that the engineer supposed that he was complying with such directions, and that the quarry from which the stone in question was taken, did belong to the state. It was doubtless a mistake; and, therefore, not a willful trespass. But it was still a trespass, for which, when discovered, due amends should have been immediately made.

It only remains to inquire whether any authority to make the appropriation of the materials in question, resulted from the nature of the office of principal engineer exercised by the defendant? This inquiry has been virtually answered already in what has been said upon the first point. If that be correct, it is conclusive of this point also. The power in question, as well

as every other to be exercised by the public officers and agents in the construction of the Oswego canal, is derived either from the general law, or the special statute authorizing that work, or from that to which the special statute expressly refers. We have already seen that this power, thus derived, is given exclusively to the canal commissioner, and could only be exercised by that officer himself in person. This, if correct, is conclusive of the whole case. The engineer possessed no power not derived either from the general law or special statute. Neither the one nor the other gave him the power in question. Nor is that power independent of the general law and the statute either an incident of the office of principal engineer, or necessary to the exercise of the other unquestionable powers, or the due discharge of the acknowledged duties of that office. It follows, then, that the defendant did not possess the power in question, neither: 1. By the general or special law; or by any directions general or special given him by the canal commissioner having charge of the work; nor, 2. As an incident of the office of principal engineer. It thence follows that the defendant was, in this case, a trespasser; and, as such, is liable in damages to the plaintiff in this action.

Upon these grounds, I am of opinion, that the judgment of the supreme court is erroneous, and should be reversed with costs.

On the question being put, Shall this judgment be reversed? all the members of the court present, who had heard the argument of the cause, answered in the affirmative. Whereupon the judgment of the supreme court was reversed.

OFFICIAL OR PRIVATE AUTHORITY INVOLVING PERSONAL DISCRETION and judgment can not be delegated to another by the public or private agent upon whom it is conferred: *Hicks v. Dorn*, 9 Abb. Pr. N. S. 53; S. C., 42 N. Y. 51; *St. Peter v. Denison*, 58 Id. 421 (both of which were cases of an attempted subdelegation of authority by the canal commissioners); *Curtis v. Leavitt*, 15 N. Y. 190; *The California*, 1 Saw. 603, all citing *Lyon v. Jerome*. It is cited also in *Ten Broeck v. Sherrill*, 71 N. Y. 279, as to what constitutes a sufficient appropriation of property by the canal commissioners.

AMERICAN INSURANCE CO. v. BRYAN.

[26 WENDELL, 563.]

INSURANCE AGAINST LOSS BY "THIEVES" in a marine policy covers a loss by simple larceny as well as a loss by "assailing thieves."

INSURANCE AGAINST LOSS BY BARRATRY of the master or mariners includes losses by larceny or embezzlement committed by the master or crew.

ERROR from the supreme court in an action originally brought in the superior court of New York city, on a policy of insurance, on goods shipped on a certain vessel. The insurance was against perils "of the seas, pirates, rovers, thieves, barratry of the master, and mariners," etc. The evidence showed that part of the goods were lost, but whether by being stolen by members of the crew, or by other persons, did not appear. The chief justice, before whom the case was tried, charged the jury in substance, that a loss occasioned by the stealing or embezzlement of the goods by the crew or by any other persons was a loss within the policy, and would warrant a recovery in this action, there being counts for a loss by "thieves" as well as for a loss by barratry, to which the defendants excepted. Verdict and judgment for the plaintiffs, and the defendants brought error to the supreme court, where the judgment was affirmed, 1 Hill, 25, when the defendants brought error to this court.

S. Stevens, for the plaintiffs in error.

B. D. Silliman, for the defendants in error.

By WALWORTH, Chancellor. The policy in this case contains the usual clause inserted in most of the American and English policies insuring against thieves and against the barratry of the master and mariners. The evidence left it a matter of doubt, whether the goods were embezzled by some of the mariners employed about the ship or steamboats, or by other thieves. The declaration contains several counts, some charging the loss to have been occasioned by barratry, and others charging it to have been by thieves. The case, therefore, presents two questions for our consideration: First, whether the word thieves, in this policy, covers a loss occasioned by a simple larceny, unaccompanied by open force or violence, by persons other than the masters and crews of the ship or steamboats in which the goods were transported? and, secondly, whether the insurance against barratry, covers a fraudulent or felonious embezzlement or stealing of the goods by the master or crew?

I had occasion to express my opinion upon the first question several years since, in the case of *The Atlantic Insurance Co. v. Storrow and Boyd*, 5 Paige, 292. In that case, I arrived at the conclusion that the elementary writers, who held that the term thieves in the policy only meant assailing thieves, had followed the language of the continental writers on this subject, without advertg to the difference in the language of their policies from that which was contained in those of England and Amer-

ica. By referring to the marine ordinance of Louis XIV., promulgated in 1681, book 3, tit. 6, art. 26, which enumerates the risks assumed by the underwriter, where there are no special stipulations on the subject in the policy, it will be seen that neither the word thieves nor barratry is used; and, so far as I have been able to discover, the only word used in any of the continental policies to cover any kind of theft, except what is included in the term barratry, is the French word *pillage*, or its equivalent. This term *pillage* imports latrocination, or robbery by force or violence, and not a simple larceny merely. Merlin defines it to be the plundering, ravaging, or carrying off of goods, commodities, or merchandise, by open force or violence. *Pillage c'est dé gât, le ravage et l'enlèvement de effets, de denrées, ou de merchandizes, à force ouverte: 23 Merlin's Repert. de Juris., art. Pillage.*

The term thieves, in our policies, is not intended as a mere translation of the word *pillage*, used in the ordinance of Louis XIV., and in the present commercial codes of France and other continental powers: See Code de Com. Francaise, book 2, tit. 10, art. 350; Lafond, D'Assur. Marit. 101, sur la Police D'Anvers; and Code de Com. D'Espagne, by Foucher, p. 292, art. 861. By a reference to the continental policies, as collected by Lafond, and to those of England and the United States, it will be seen that the language of the continental policies is in a great many other respects entirely dissimilar from the language of English and American policies. In the absence of any judicial decision to the contrary, therefore, the most that can be inferred from the elementary writers on the subject is that the term *pillage*, in the continental policies, does not include simple larceny; and that the term thieves, in our policies, does not include theft perpetrated by the master or mariners, so that losses by larcenies of this last description must fall upon the assured, where there is no insurance against barratry by the master and the crew. Marshall, who wrote in 1802, appears to consider it as settled that the word thieves in a policy, only means assailing thieves, or those who assail or rob the ship by violence from without; but to show that this was not considered, even in England, as the settled construction of the word thieves in the policy, at that time, it is only necessary to refer to the work of Mr. Justice Park, the fifth edition of which was published under his own inspection in the same year that Marshall wrote. After referring to what is said by Malyne and by Roccus on this subject, especially by the latter, he adds: "It was thought proper thus to

state the opinion of this learned writer upon the subject, the law of England in this respect being silent, though his reasoning upon this subject is by no means conclusive as to English insurances, on account of the express terms of the contract:" Park on Ins. 25. And Mr. Hughes, who wrote twenty-six years afterwards, does not consider the question as settled, that the word thieves may not include losses by theft committed by persons on ship board as passengers, where the loss occurs without the fault of the assured: Hughes on Ins. 232.

Upon the second question there appears to be very little room to doubt that an insurance against barratry by the masters and mariners includes larcenies and embezzlements of the goods insured, either by the master or the crew, other than mere petty thefts. By the ancient law of France, according to Valin, the insurer was answerable for the barratry of the master and crew without any express provision in the policy to that effect; but not until the owner of the goods insured had exhausted his remedy against the master for the loss sustained: See Valin's Comm. upon the Ordin. of Louis XIV., by Becave, vol. 2, p. 303. The ordinance, however, declared the insurer not liable for barratry of the master and mariners, where he was not by the terms of the policy charged with a loss by barratry. The same provision is contained in the commercial code of Napoleon, and in the commercial code of Spain, promulgated by Ferdinand VII. in 1829. But where, by the terms of the policy, the insurers take upon themselves the risk of barratry by the master and mariners, known to the continental lawyers by the terms barratry of the patron, they are answerable absolutely for any damage resulting from the acts of the master or crew, either by reason of ignorance, rashness, malice, change of route, larceny, or otherwise; and such is also the law of Holland, according to Valin: See 2 Becave's Valin, 303. The meaning of the term barratry in British and American policies is not quite as extensive; but it unquestionably includes every act of the master or mariners of a criminal or fraudulent nature, tending to their own benefit and to the prejudice of the owners or charterers of the vessel. In the language of Mr. Justice Aston, in *Vallejo v. Wheeler*, Cowp. 156, it includes every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured; and it is equally extensive in its meaning when applied to the conduct of the mariners, except that it may not include petty thefts: 1 Phil. on Ins. 239. I have no doubt, therefore, that the stealing or embezzlement of the property in controversy,

in this case, if perpetrated by the master or mariners of the ship, or of any of the steamboats upon which the goods were transported, was an act of barratry covered by the policy.

For these reasons, I think the charge of the judge who tried the cause was not erroneous; and that the judgment of the supreme court sustaining the decision of the superior court of the city of New York should be affirmed.

VERPLANCK, Senator, also delivered an opinion in favor of affirming the judgment, of which the following is a synopsis:

The charge unquestionably misled the jury, if under the clause against barratry by the crew the insurers are not liable for their thefts, at least without proof that there was no want of due care by the master. The meaning of the word barratry in its English use is well settled since the time of Lord Mansfield's series of decisions on insurance law. It includes, as was said by him, "whatever is a cheat, a fraud, a cozening, a trick by the master:" *Vallejo v. Wheeler*, Cowp. 154; or, as stated by Judge Aston, it comprehends "every species of fraud, knavery, or criminal conduct, by which the owner or freighter is injured." Lord Ellenborough's definition is substantially the same: *Earle v. Rowcroft*, 8 East, 126. Chancellor Kent sums up the definitions of barratry as follows: "It means fraudulent conduct of the master in his character of master, or of the mariners. It includes even breach of trust committed with dishonest views." These definitions are generally given in cases of barratry by masters, but they apply also to barratry by the crew. "Barratry of mariners," therefore, in a policy of insurance must include all fraud, knavery, breach of trust, or other criminal conduct on their part whereby the assured suffers loss. Hence it covers embezzlement. It has been so held as to embezzlement by the master and by carriers and their servants generally: See *Boehm v. Combe*, 2 Mau. & Sel. 172.

It is true that the ship owner is liable for losses to shippers from the theft and pilfering of the crew, and that the crew may be liable to contribute from their wages for the reparation of such losses. But the express object of an insurance against barratry is to exempt the shipper from the risk of the shipowner's solvency, and from the difficulty of showing exactly how a loss occurred. It leaves the insurer, after being substituted to the rights of the assured by paying the loss, to follow out and assert those rights. It has been laid down that insurers are not answerable for any breach of trust by the mariners to the same extent as for that of the master, for the reason that the assured

is presumed to have more control over the crew, and, from the little trust ordinarily reposed in them, to be answerable for their conduct to a greater degree; but that with this distinction an act of barratry of the crew does not differ from a similar act by the master; and the insurers are answerable for any loss occasioned by the barratry of the mariners, if with due caution and diligence it could not have been prevented, but are, in general, not liable for petty thefts and embezzlements, since they might have been prevented: 1 Phil. Ins. (1st ed.) 238; *Pipon v. Cope*, 1 Camp. 434. The presumed control of the crew by the assured through the master in the case of an insurance on a shipment of goods is, however, purely theoretical, the shipper generally having in fact no greater control than the insurer.

Barratry, or criminal knavery, of mariners, including thereunder embezzlement of the goods, is a peril insured against. The insurer is *prima facie* liable for a loss from that cause; but if the barratrous act arose from the master's fault or negligence short of actual barratry in him, the insurer is not liable unless he has insured specially against such negligence, any more than he would be liable for a loss by shipwreck occurring through the master's ignorance or inattention, and not specially insured against: 3 Kent's Com. 300. The burden, however, is on the insurer to show that a loss by barratry of the crew for which he is *prima facie* liable was caused by the master's fault or negligence. The rule, in this respect, is the same as in case of a loss by shipwreck where the insurer relies upon negligence, deviation, or the like, to excuse him: See *Williams v. East India Co.*, 3 East, 192; *Tidmarsh v. Washington Ins. Co.*, 4 Mason, 441; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383. So where the insurer seeks to excuse a loss by barratry of the master: *Ross v. Hunter*, 4 T. R. 37. So where an alleged violation of a local law is relied on to escape liability for a loss: 4 Camp. 234. In the present case, the plaintiffs were not bound to prove care and vigilance by the master and others to prevent the loss, for they are to be presumed until the contrary appears. This must be especially the rule in a case like this, where the naked fact of negligence by the master would not excuse the insurer, since such negligence might itself amount to barratry and so be within the policy: *Palapasco Ins. Co. v. Coulter*, 11 Pet. 225. And again, the master's negligence might be too remote a cause of the loss to furnish any excuse: *Id.* The insurers, therefore, in order to excuse themselves, must show negligence by the master

which, on the one hand, was not barratrous, and, on the other, was not too remote or accidental.

In this case, however, it is not clear upon the proof whether the goods were secretly stolen by members of the crew or by other thieves, which gives rise to the question whether an insurance against "thieves" means thieves generally, or is restricted to "assailing thieves." The former is undoubtedly the ordinary meaning. It is equally undoubted that the latter is regarded by the older authorities as the sense in which the word is used in marine policies: 3 Kent Com. 303, criticising *Atlantic Ins. Co. v. Storrow*, 5 Paige Ch. 293; Roccus, note 42; Emerigon, 1 Ch. 12; 1 Phil. Ins. 258. The authority of the old books ought, undoubtedly, to have great weight in the construction of marine insurance contracts, because the policy of marine insurance has been gradually formed by two centuries and a half of commercial usage, and necessarily retains much of its original form, and much of the ancient phraseology, made intelligible by the custom of merchants and underwriters: 4 T. R. 238. It is important, therefore, to ascertain how far the authorities of the books are correct or applicable in modern use.

There are no direct adjudications as to the meaning of the word "thieves" in a marine policy, except *Atlantic Ins. Co. v. Storrow*, 5 Paige 293, and the decision of the court below in this case. It is settled, however, that the word covers "robbery with violence committed by persons from without the ship:" *Harford v. Maynard*, cited by Park. But is there sufficient reason for restricting the meaning to "robbery with violence"? The question is merely one of the interpretation of the written contract. The clause of insurance against "thieves" seems not to be in use in ordinary policies in France, Italy, Spain, Holland, or the north of Europe; but in English policies it is of very old date, and may probably be traced back to the reign of James I.; see the forms given in Postlethwaite's Dict. of Commerce (1751), and by Molloy and Malynes. What then was the old use and meaning of the word "thieves?" The primary, and now the ordinary, signification is secret stealing or larceny. It formerly had a more general meaning, and included what we now term robbery as well as larceny. This is well shown by the use of the word in the English bible, where it is applied indiscriminately to secret theft and robbery by violence. The Greek words κλεπτης, "secret thief" and ληστης, "robber by force," are both translated "thief" except when used in the same sentence: John x., 1. The same extended use of the word

theft, as including felonious taking with or without force, is found in Blackstone. That this is the meaning which the word is ordinarily understood to have in policies of insurance is indicated by the fact that in many modern policies, when the underwriters wish to restrict their liability to a robbery by force, they use the phrase "assailing thieves." Against the general usage and understanding we have only the *dicta* of the eminent jurists before referred to. The latter should not be permitted to overrule the former.

It has been urged here also that a loss by thieves is not within the policy if it was occasioned by the negligence of the master. The answer is the same as that already given respecting a loss by barratry. The insurer is *prima facie* liable for a loss by thieves; and if he relies upon the master's negligence to excuse him, it rests upon him to prove that there was such negligence, and that it was a proximate cause of the loss.

On the question being put, Shall this judgment be reversed? all the members of the court present at the argument answered in the negative.

Whereupon the judgment of the supreme court was affirmed.

BARRATRY, WHAT CONSTITUTES: See *Wilcox v. Union Ins. Co.*, 4 Am. Dec. 480; *Wiggin v. Amory*, 7 Id. 175; *Brown v. Union Ins. Co.*, 5 Id. 123; *Mil-landon v. N. O. Ins. Co.*, 13 Id. 358. The principal case is cited generally as to what constitutes barratry by master or mariners within the meaning of a policy of insurance, in *Atkinson v. Great Western Ins. Co.*, 4 Daly, 27; S. C., in court of appeals, 65 N. Y. 537. So it is cited in *Spinetti v. Atlas Steam-ship Co.*, 80 N. Y. 75, to the particular point that "barratry of mariners" includes theft and embezzlement by the crew.

WHERE NEGLIGENCE OF MASTER IS REMOTE CAUSE of a loss, the proximate cause being a peril expressly insured against, the insurer is not excused: *Mathews v. Howard Ins. Co.*, 13 Barb. 244; S. C., in court of appeals, 11 N. Y. 21, both referring with approval to the opinion of Verplanck, senator, in the principal case.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

MOTT v. ROBBINS AND ANOTHER.

[1 HILL, 21.]

SALE OF OFFICE.—Appointment of a deputy sheriff under an agreement that he shall pay to his principal one half of the fees received by such deputy for his services is not the selling of an office.

BOND OF DEPUTY SHERIFF conditioned that he will indemnify the principal from all damages arising from the deputy's conduct and pay to the sheriff one half of all fees received, is valid.

OFFICER MAY TAKE AN AGREEMENT for the payment to him of part of the fees of his office, because he is in law entitled to the whole thereof; and he may divide his fees with a deputy as a mode of paying the latter for services.

AGREEMENT BY A DEPUTY TO PAY THE PRINCIPAL A SPECIFIED SUM, not arising out of the profits of the office, is void, as amounting to the sale of an office.

DEBT upon a bond with sureties, given by a deputy sheriff to his principal, conditioned to indemnify the sheriff from all damages, on account of the official acts of such deputy and to pay the sheriff one half of the fees received by the deputy. At the trial the defendants insisted that the bond was void, because within the prohibition of the revised statute against taking bonds *colore officii* and against selling offices. Plaintiffs recovered.

W. Tracy, for the defendants.

J. A. Spencer, for the plaintiff.

By Court, BRONSON, J. We are referred to the statute which prohibits the sheriff from taking a bond or other security *colore*

officii (2 R. S. 286, sec. 59), and to the statute against selling offices (Id. 696, secs. 35, 37), to prove that the bond of the deputy is void. The sheriff has authority to appoint deputies (1 Id. 379, sec 73); but there is no law regulating the amount of compensation which the deputy shall receive, as was the case in *Tappan v. Brown*, 9 Wend. 175. The sheriff has here taken a bond from the deputy for the faithful discharge of his duties, and to account for and pay over one half of the fees of such business as should be done by the deputy. There can be no doubt that the bond is valid. The question has been long settled in cases coming under the statute 5 and 6 Ed. VI., c. 16, from which our statute against the sale of offices was taken. When the principal, on appointing a deputy, takes an agreement for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void. But where he reserves a part of the fees of the office, or a sum certain, which is to come out of the profits, the contract is good. And the reason why the principal may take a stipulation for a part of the fees or profits, is because the whole belongs to him; and, as has been said, "it is only reserving a part of his own, and giving away the rest to another:" *Godolphin v. Tudor*, 2 Salk. 468; S. C., 6 Mod. 234; 1 Bro. P. C. 98, affirmed in the house of lords; *Culliford v. Cardinel*, Comb. 356; S. C., by the name of *Culliford v. Cordonmy*, 12 Mod. 90; Com. Dig., tit. Officer, K. 1. In the case of *Tappan v. Brown*, 9 Wend. 75, a part of the fees belonged by law to the deputy. But in this case they all belong to the sheriff; and the agreement to divide them, is only a mode of settling the compensation of the deputy for such services as he might render. Such an agreement the parties were at liberty to make.

New trial denied.

Cited in *Kelly v. McCormick*, 2 E. D. Smith, 511, as to when securities taken by a sheriff will not be considered as having been exacted *colore officii*.

COVENEY v. TANNAHILL ET AL.

[1 HILL, 83.]

CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT, whether oral or written, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege.

ATTORNEY CAN NOT BE REQUIRED TO PRODUCE A PAPER NOR TO DISCLOSE ITS CONTENTS, when it was deposited with him by his client. He may be required to testify concerning its existence, and whether it is in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents.

ATTORNEY WITNESSING A DEED, OR THE SIGNING OF AN ANSWER, or any other fact, may be required to testify concerning the same.

ATTORNEY BEING ASKED WHETHER HE WAS PRESENT WHEN AN ACCOUNT STATED WAS SIGNED, and when and where it was signed, and who were present, can not properly refuse to answer on the ground that the matter is in the nature of a privileged communication.

SUBPENA DUCES TECUM UPON AN ATTORNEY TO PRODUCE PAPERS of his client, need not be obeyed.

ACTS AND TRANSACTIONS OF A CLIENT, DONE IN THE PRESENCE OF AN ATTORNEY, may be testified to by the latter.

PRIVILEGED RELATION OF ATTORNEY AND CLIENT exists for lawful purposes only, and the former may be required to disclose a criminal design confided to him by the latter.

WHETHER COMMUNICATION IS PRIVILEGED is for the court to decide.

ATTORNEY CALLED BY HIS CLIENT TO WITNESS A BUSINESS TRANSACTION between the latter and a third person, is not privileged from testifying to what he there saw.

ATTORNEY CAN NOT BE REQUIRED TO TESTIFY WHAT WAS THE STATE of a written instrument when first exhibited to him by his client, or whether, when he first saw an account in the hands of his client, the evidence of settlement was indorsed on it.

MOTION to set aside the report of referees. It was made by the defendants, Edwards and McKibben. Plaintiff gave in evidence a written account stated, with an acknowledgment, in the handwriting of Tannahill, in the name of John Tannahill & Co., that a balance of seven hundred and forty-seven dollars and thirty-six cents was due plaintiff. Edwards and McKibben sought to show that this acknowledgment was made by Tannahill to defraud them, and after he had been enjoined from interfering with partnership accounts. They called as a witness S. E. Sill, plaintiff's counsel, and asked him: 1. Whether he was present when the account stated was signed; 2. If so, when and where was it signed, and in whose presence; 3. When he first saw the account, and whether at that time the acknowledgment was indorsed on it. The witness said he could not answer the questions without violating professional confidence, and that all his knowledge was obtained as counsel in the cause. The referees did not require him to answer either question.

W. L. G. Smith, for the defendants.

Hawley and Sill, for the plaintiff.

By Court, BRONSON, J. Confidential communications between attorney and client, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege. The mode in which the information is communicated—whether by an oral statement of facts, or by delivering

a written instrument—can not be important. The principle is the same in whatever way the information passes. The policy of the law allows a man to make the best defense in his power. Whatever may be his delinquency, he is permitted to confer freely with his counsel, and to place in his hands any paper touching the matter in question, without the peril of having his confidence betrayed under the forms of law. The attorney may be called to prove the existence of a paper, and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents. But he can not be compelled to produce or disclose the contents of a paper which has been deposited with him by his client: *Brandt v. Klein*, 17 Johns. 335; *Jackson v. McVey*, 18 Id. 330; *Rex v. Smith*, 1 Phil. Ev. 142; *Brard v. Ackerman*, 5 Esp. 119; and see *Bevan v. Waters*, 1 M. & M. 235; *Eicke v. Nokes*, Id. 303; Vin. Abr., Discovery, I; *Durkee v. Leland*, 4 Vern. 612; *Anon.*, 8 Mass. 370. In *Wright v. Mayer*, 6 Ves. 280, Lord Eldon said, he never heard of a *subpœna duces tecum* upon an attorney, to produce the papers of his client. In *Rex v. Dixon*, 3 Burr. 1687, the point was decided, that the attorney was not obliged to obey such a subpœna. Lord Mansfield said, that instead of producing the papers, the attorney ought immediately, upon receiving the subpœna, to have delivered them up to his client.

This privilege of the client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference, in principle, between communications made by the client, and acts done by him in the presence of the attorney. It may be, and undoubtedly is, sound policy to close the attorney's mouth in relation to the former, while in many cases it would be grossly immoral to do so in relation to the latter. It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defense; but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as counsel to see or aid in the transaction. Indeed, I think there can be no such relation as that of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes.

Chief Baron Gilbert, after stating the general rule in relation to the exclusion of counsel, says: "Where the original ground of communication is *malum in se*, as if he be consulted on an

intention to commit a forgery or perjury, this can never be included within the compass of professional confidence; being equally contrary to his duty in his profession, his duty as a citizen, and as a man. But if such offense, as forgery for example, committed without his being privy, comes to his knowledge in the course of confidential transactions with his client in the way of business, he shall not be compelled to assist in proving it:" 1 Gilb. Ev. 277, Dublin, 1795; see *Clay v. Williams*, 2 Munf. 105 [5 Am. Dec. 453]; *Parker v. Carter*, 4 Id. 273 [6 Am. Dec. 513]; *Rex v. Haydn*, 2 Fox & Smith (K. B. in Ireland), 379.

I will not undertake to say how far the distinction between the communications and the acts of the client may extend, but there can be no good reason for excluding the attorney when he has witnessed a transaction in the way of business between his client and a third person; as the adjustment of an account, the execution of a deed, the payment of a sum of money, the giving up of securities, or the like. It is not necessary that a man should have an attorney to witness his dealings with third persons; and if one is called in, I can see no reason why he, like any other person who was present, should not be sworn to prove what was done.

In the case at bar, I feel no difficulty in saying, that Mr. Sill should have been required to answer the first two questions which were put to him. He says he could not do so without violating the confidence reposed in him by his client. But that was a question for the referees—not the witness. When the facts are disclosed, it is for the court to decide whether the witness should be required to answer. The substance of the first two questions put to the witness is: "Was you present when the account stated was signed; when and where was it done, and who was present?" The witness answered, that all his knowledge of the writing had been obtained by him as counsel in the cause. He evidently did not intend to say that he was not present, etc.; for that would be answering, instead of declining to answer, the questions put to him. The meaning of the answer is, that if the witness was present and saw the paper signed, etc., he was so present as counsel for the plaintiff. The case then comes to this: The plaintiff, in adjusting an account with a third person, and procuring a written acknowledgment of a balance due, calls in a counselor at law to witness the transaction; and the question is, whether the attorney shall be permitted to speak without the leave of his client? Upon that question I can not entertain a doubt. What was done and

said between the plaintiff and Tannahill in the way of business, can not be turned into a confidential communication between attorney and client, merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to the attorney, and he might have been required to answer, not only when and where the account was signed, but as to everything that was done and said between the plaintiff and Tannahill on that occasion, so far as the matter would be pertinent if proved by any other witness. If any communications passed between the attorney and client apart from Tannahill, these may be privileged; but nothing else.

In *Lord Say and Seal's case*, 10 Mod. 40, the objection to a common recovery was, that there was no tenant to the *præcipe*; and on producing a deed, the attorney who had been intrusted in suffering the recovery was called to prove that the deed had been antedated five months; and he was admitted. The court said, that "a thing of such a nature as the time of executing a deed, could not be called the secret of his client; that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or anybody else, might inform the court of." From the manner in which this case is cited by Buller, N. P. 284, it may be inferred that the attorney was a subscribing witness to the deed, but no such fact is mentioned by the reporter. In *Rex v. Watkinson*, 2 Str. 1122, the defendant was indicted for perjury in an answer in chancery, and his solicitor, who was present when the answer was put in, was called to identify the defendant as the person who was sworn; but Chief Justice Lee would not compel the solicitor to testify. "*Quære tamen*," says the reporter, "for this was to a fact in his own knowledge, and no manner of secrecy committed to him by his client." That the reporter was right, and the court wrong, has been agreed ever since. In *Doe v. Andrews*, Cowp. 845, Lord Mansfield said: "I have known an attorney obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury." And see Bull. N. P. 284; 1 Phil. Ev. 146, 7th ed.; 1 Gilb. Ev. 277; 2 Stark. Ev. 398; Roscoe's Cr. Ev. 150; Peake's Ev. (Norris), 251; *Greenough v. Gaskell*, 1 Myl. & K. 98. In *Studdy v. Sanders*, 2 Dow. & Ry. 347, the clerk of the solicitor was called to identify the defendants as the persons who had put in an answer in chancery, and it appearing that his knowledge of the fact arose wholly from communications with the defendants, the evidence was rejected, and the plaintiff nonsuited. But the

nonsuit was set aside. The court said, the fact offered to be proved was not in the nature of a confidential communication between attorney and client, because it was a fact easily cognizable to the witness and to many others persons, without any confidence on the subject being reposed in him. See *Parkins v. Hawkshaw*, 2 Stark. 239, which seems to be the other way. But the witness was not called to speak of an act, but to disclose communications with the client.

The attorney may be called against his client to prove a deed to which he is a subscribing witness. In *Doe v. Andrews* (Cowp. 845), Lord Mansfield said: "An attorney has no privilege to give evidence of collateral facts." In *Robson v. Kemp* (5 Esp. 52), the attorney was required to testify concerning a warrant of attorney which he had subscribed as a witness. Lord Ellenborough said, the attorney was bound to disclose all that passed at the time, respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it; upon which matters he had a right to be silent: S. C., 4 Esp. 235. In *Hurd v. Moring*, 1 Car. & Payne, 372, the attorney was required to prove his client's handwriting, although his knowledge of it was acquired solely from seeing him sign the bail bond; and in *Johnson v. Daverne*, 19 Johns. 134 [10 Am. Dec. 198], the attorney had acquired a knowledge of his client's handwriting after the retainer, but without any confidential communication, and it was held that he was bound to testify. In *Sanford v. Remington*, 2 Ves. jun. 189, the chancellor said, the witness may be called on to disclose all that did pass in his presence at the execution of the deed; so his having been sent by his client with orders to put the judgment in execution—that is an act; but he is not to disclose the private conversation as to the deed, with regard to what was communicated as to the reasons for making it.

In *Robson v. Kemp*, 5 Esp. 52, the attorney was called to prove the destruction of a deed, and said, that all he knew about it had been acquired by being called in by both parties as their attorney; and Lord Ellenborough rejected the evidence. He remarked: "The act can not be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is privileged as well as another. He can not be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as attorney." Notwithstanding what

is said about the sense of seeing being privileged, I think the witness must have been questioned concerning what was said by the client; for the judge immediately adds: "I therefore think, if the only knowledge he has, as to the destruction of this instrument, was acquired from the confidential communication made to him as an attorney, that he can not be examined to it." It may have been thought important that the witness had acted as attorney for both parties; for where an attorney is called in by one party to witness a transaction in the way of business with a third person, I can not think that his mouth is closed either as to what he saw or what he heard. It is not in the nature of a confidential communication between an attorney and client: See *Lessee of Devoy v. Burke*, 2 Fox & Smith, Irish K. B. 191. In *Duffin v. Smith*, Peake's N. P. Cas. 108, the defendant called the plaintiff's attorney, to prove that the consideration of the bond in suit was usurious; and he was admitted. Lord Kenyon said: "Where anything is communicated to an attorney by his client for the purpose of his defense, he ought not to divulge it; but where he himself is, as it were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person:" See 12 Vin. Abr. 38, pl. 1.

An attorney's clerk may be called to prove that he received a particular paper from the client: *Eicke v. Nokes*, 1 M. & M. 303. And the attorney may be required to make discovery of a deed intrusted to him by his client, by answering whether there was such a deed, where it is, to whom delivered, when he last saw it, and in whose custody; but not to produce the deed, or discover its contents: *Kington v. Gale*, 8 Viner's Abr. 548. Mr. Justice Buller, in speaking of cases where the attorney may be called, says: "If the question were about a rasure in a deed or will, he might be examined to the question whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head. So, if an attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by the client:" Bull. N. P. 284. In the case at bar, the witness was questioned as to "a fact in his own knowledge;" it was "no matter of secrecy committed to him by

his client;" and I can see no possible reason why he should not answer.

There is a further reason for holding the evidence admissible. The case which the defendant's counsel proposed to make out, was, that the account was stated, and a large balance acknowledged to be due the plaintiff, for the purpose of defrauding the defendants, Edwards & McKibben. Now, if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may, perhaps, be privileged; and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose, whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame, or his property, may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness: See the remarks of Ld. Brougham, in *Greenough v. Gaskell*, 1 Myln. & K. 98.

The third question proposed to the witness was, in substance: "When did you first see the account stated, and was the evidence of a settlement indorsed on the account when you first saw it?" Although the question does not necessarily imply so much, it was understood on the hearing as intended to draw from the witness an admission that he had seen the paper in the hands of his client, or received it from him, in a different state or condition from that in which it appeared on the trial. If such was the aim of the defendants in putting the question, I think the referees were right in not allowing it to be answered. We have already seen that the attorney can not be compelled either to produce or to disclose the contents of a paper which he has received from his client; and this is so although the paper may be required as the foundation for a public prosecution: *Rex v. Dixon*, 3 Burr. 1687; *Rex v. Smith*, 1 Phil. Ev. 142. The principle is, that all confidential communications between attorney and client, whether written or oral, are alike privileged. If the plaintiff, at any particular time, delivered or exhibited the account to his attorney without the evidence of a settlement indorsed upon it, it was the same thing, in substance, as though he had at that time told him verbally that he had an account in

that plight; and the one form of communication is, I think, as much privileged as the other.

No case which has fallen under my observation necessarily goes the length of deciding that such a question must be answered. In *Lord Say and Seal's case*, 10 Mod. 40, it does not appear that the fact of the antedating of the deed, was in any form communicated to the attorney by his client. On the contrary, it may fairly be inferred from what is said, that the antedating of the deed was the joint work of the attorney and client; and in that point of view, the decision supports a position which has already been stated, that the attorney must answer as to any fraudulent act on the part of the client which was done in his presence. The cases to which I have already referred, to show that the attorney may be called to identify his client as the person who had sworn to an answer in chancery, to prove a deed to which the attorney is a subscribing witness, or to prove the handwriting of the client, all stand on the ground that the knowledge of the attorney was not acquired as a secret from his client. In *Duffin v. Smith*, Peake's N. P. Cas. 108, where the plaintiff's attorney was required to testify to the usurious consideration of the bond and mortgage, the facts are very briefly stated; but it is quite clear that Lord Kenyon did not intend to depart from the general principle; for he said: "Where anything is communicated to an attorney by his client, for the purpose of defense, he ought not to divulge it; but where he himself is, as it were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person."

In *Baker v. Arnold*, 1 Cai. 258, the question was presented, whether the attorney could be required to answer as to what state the note was in when he received it from his client; and the reporter supposed the point was decided in favor of the admissibility of the evidence. But he was mistaken; the case went off on another question. (See the remarks upon this case in *Brandt v. Klein*, 17 Johns. 338.) Although the point was not decided in *Baker v. Arnold*, it was discussed by three of the judges; and Thompson and Livingston, JJ., were of opinion, that the witness should not be required to answer the question: Radcliff, J., held the contrary; and the other two judges expressed no opinion on the point. It is said in Buller's N. P. 284, in mentioning the cases where the attorney may be called—"If the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen such deed

or will in other plight, for that is a fact of his own knowledge." The reason assigned by Buller plainly shows, that he was speaking of a case where the attorney had acquired his knowledge of the state of the instrument previous to his retainer, or in some other way than from his client. (See *per* Thompson, J., in *Baker v. Arnold*, 1 Cai. 267, 268.) Although he does not cite it, I have no doubt that Buller had in his mind the case of *Cuts v. Pickering*, 1 Vent. 197, where, on a trial at bar, it was held, that the solicitor must answer as to what his client had told him before the retainer concerning a rasure in a will. In *Brown v. Payson*, 6 N. H. 443, the precise point was adjudged, that the attorney can not be required to testify concerning the state of a written instrument, at the time it was received from his client, for the purpose of commencing an action upon it. To that doctrine I fully assent. I am unable to perceive any solid distinction between the oral statement of a fact to counsel, and a communication of the same fact, by delivering to him a deed or other written instrument.

The referees were right in not permitting the last question to be answered; but as they were wrong in relation to the first two questions, there must be a rehearing.

Report set aside.

COMMUNICATIONS TO AN ATTORNEY ARE PRIVILEGED wherever made for the purpose of seeking professional advice or aid, or to enable him to act towards the protection of his client's rights: *Clark v. Richards*, 3 E. D. Smith, 95; *Graham v. People*, 63 Barb. 482; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 595. It appears once to have been considered that a communication to be privileged must have been made with reference either to a suit then in progress or to one that was in contemplation, and there is a *dictum* to that effect in *Whiting v. Barney*, 30 N. Y. 342. This view has not prevailed in New York. It is now sufficient, as said above, that the communication be made as a basis to obtain professional advice: *Clark v. Richards*, *supra*; *Graham v. People*, *Id.*; *March v. Ludlum*, 3 Sandf. Ch. 46; *Britton v. Lorenz*, 45 N. Y. 57.

The privilege extends to preventing the attorney from disclosing the contents of papers intrusted to him by his client for his professional advice: *Mallory v. Benjamin*, 9 Barb. 423; but he might in such a case be compelled to testify as to his custody of the paper so as to lay a foundation for the introduction by the opposing party of secondary evidence as to its contents: *Mitchell's case*, 12 Abb. Pr. 259. Communications are privileged though made to obtain advice in regard to a fraud: *Peck v. Williams*, 13 Abb. Pr. 71; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 600; the only instance in which the communication is not privileged being where it is one made with reference to a meditated crime: *Id.*

But information which has been acquired by an attorney in the course of his professional duties is not privileged, if the knowledge was not acquired from his client: *Crosby v. Berger*, 11 Paige, 379. Nor where an attorney has

been employed by several to draw up an agreement or a deed, will the communications, acts, and declarations of the parties in his presence be privileged from disclosure: *Root v. Wright*, 21 Hun, 348; *Hubbard v. Haughman*, 70 N. Y. 61; *Britton v. Lorenz*, 45 Id. 57. It was decided differently in *Whiting v. Barney*, 38 Barb. 399; but the case was reversed on error: 30 N. Y. 330. Under a statute providing that "no person authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to prescribe for such patient as physician, or to do any act for him as surgeon," the New York courts have applied to the case of information acquired by a physician somewhat of the same rules that have been established for the government of attorneys. Thus it has been held that the "information" meant by the statute includes not only information acquired directly from the patient, by means of verbal communications, but all that he has learned by means and by reason of his professional character: *Edington v. Mut. Life Ins. Co.*, 5 Hun, 9. It has also been decided that the privilege is personal to the patient, and therefore a murderer may not object to the evidence of the physician, who attended upon his victim: *Pierson v. People*, 18 Id. 249. All these cases cite the principal case.

The cases in this series upon this subject will be found collected in the note to *Beltzhoover v. Blackstock*, 27 Am. Dec. 334.

THE PEOPLE v. COGDELL.

[1 HILL, 94.]

LARCENY—THE FINDER OF A POCKETBOOK CONTAINING BANK BILLS, but having no mark on or about it, by which the name of the owner could be ascertained, can not be convicted of larceny, though the book was immediately demanded by the owner, and the finder denied having it and concealed and fraudulently converted the bills, unless it further appears that the finder, when he acquired possession, knew who the owner was, or had the means of identifying him *instantly* by marks on or about the property.

CERTIORARI. Cogdell had been convicted of stealing the pocket-book of John Warren, with six hundred dollars in bills therein contained. Book and contents having been lost in the highway, Cogdell found and at once concealed them. The other facts appear in the opinion of the court.

H. G. Wisner, for the defendant.

C. Borland, district attorney, for the people.

By Court, COWEN, J. There was abundant proof of the concealment and fraudulent conversion of the money, after it had been found. This was undoubtedly under a full consciousness in the prisoner, that it was accidentally lost. It was immediately demanded of him by the owner, who suspected his having found it; but the prisoner denied the finding, and concealed the

bills. By the owner's good fortune, they were traced to the hands of the prisoner, and finally restored; but this was after a course of evasion and concealment, plainly indicating his fraudulent intent to keep the money if possible.

It did not appear in evidence, that the pocket-book or money had any mark by which the prisoner could have discovered Warren to be the owner, though he must have been conscious that the owner, whoever he might be, would make an effort to find the money. He did make such effort, offering a reward to the prisoner personally. In short, the loss and finding were purely accidental. Every thing after that, done by the prisoner, was characteristic of the thief; and if he can escape the legal consequences of the conviction of larceny, it must be solely because that crime is not predicable of a taking and conversion under the circumstances mentioned. Singular as it may seem to one reasoning upon principle, this appears to be the settled doctrine of the law, and was considered to be so by this court in *The People v. Anderson*, 14 Johns. 294 [7 Am. Dec. 462]. It is supposed, I perceive, by the counsel for the state, that from what was said in *The People v. McGarren*, 17 Wend. 460, we may be considered as holding it a duty to disregard the adjudication in *The People v. Anderson*, which is not denied to be a point-blank case against the prosecution. But neither the decision, nor any *dictum* in *The People v. McGarren*, nor the course of reasoning in that case, goes at all to countenance such an expectation. All we asserted there was, that probably the rule must be confined to such a case as the present, where it does not appear that the prisoner knew, or had the means of knowing the true owner; and cases were cited to that effect. One was, where the pocket-book found was legibly marked with the owner's name, the finder being able to read. Such cases themselves imply, that if the owner has placed no mark about the property, and none exists, by which the finder can discover him, the case must still be considered, as it long has been, one of mere trover and conversion—not of larceny. The general remark in *The People v. McGarren*, that a finder, having the means of discovery, is an exception, must be taken with the limitation indicated by the authorities referred to. Every finder may be said to have the means of discovering the owner by the exercise of an honest diligence; and if, when valuable property is lost, such means may be made a test, the doctrine of *The People v. Anderson* is indeed gone. Scarcely any finder could fail in his search; and this being generally obvious to a jury, they would hardly ever

fail to convict for that reason. The rule would thus, in practice, be brought down to a very narrow exception.

It may be very difficult to perceive any reason in sound morals, why this should not be so; but that is no argument for disregarding a settled rule of law.

New trial ordered.

LARCENY OF STOLEN GOODS: See *State v. Roper*, 24 Am. Dec. 268, and note.

BLOOM ET AL. v. BURDICK.

[1 HILL, 130.]

OMISSION OF SURETY FROM ADMINISTRATOR'S BOND does not make void the grant of letters to him.

TO THE JURISDICTION OF THE SURROGATE IN GRANTING ADMINISTRATION two things only are essential, viz.: 1. The death of the intestate; and 2. His inhabitancy, at or immediately preceding his death, of the county in which the administration was granted.

JURISDICTION TO ORDER A SALE OF REALTY DEPENDS on a petition and account.

ACCOUNT REQUISITE TO WARRANT A SALE OF REALTY can not be dispensed with because an inventory has previously been filed, although a general reference to such inventory is made.

IF AN ACCOUNT IS PRESENTED, its effect is not destroyed by calling it an inventory.

ONE DOCUMENT MAY ANSWER THE DOUBLE PURPOSE of an account and an inventory; and an inventory made and presented at the time the petition for an order of sale is filed, may be treated as an account and give the court jurisdiction to the same extent as a separate account containing the same matters.

IF IT DOES NOT CLEARLY APPEAR AT WHAT TIME THE INVENTORY WAS FILED, but there is some evidence tending to show its filing at the time the sale was petitioned for, the question whether it was filed at the proper time to support the order of sale must be submitted to the jury.

APPLICATION OF PERSONAL ESTATE TO PAYMENT OF DEBTS need not be made before petitioning for a sale; it is sufficient that such application has been made when the order of sale is granted.

DESCRIPTION OF LAND IN AN ORDER OF SALE, as ninety-one acres of the southwest corner of lot number eleven, is not fatally defective if the intestate owned that number of acres and no more in the lot named.

IN EJECTMENT DEFENDANT MAY SHOW TITLE OUT OF PLAINTIFFS, though he does not connect himself with it, if he did not enter under them.

JURISDICTION OVER THE PERSONS to be affected by a surrogate's sale must be obtained in some manner sanctioned by law, otherwise the proceeding will be void.

SURROGATE COURT IS OF INFERIOR JURISDICTION—a mere creature of the statute. Persons claiming under its orders must show affirmatively that it obtained jurisdiction to make them by pursuing the forms prescribed by the statute.

APPOINTMENT OF GUARDIAN TO APPEAR FOR AND REPRESENT INFANT

HEIRS on an application to sell real estate is jurisdictional. If such appointment is not made, the order of sale is void.

STATUTORY AUTHORITY by which a man may be deprived of his estate must be strictly pursued.

EJECTMENT. The premises formerly belonged to Henry Bloom, who died seised thereof in 1818. He had nine children, of whom four were infants at the date of his decease. These four were the plaintiffs in the present suit. The defendants attempted to deraign title through a surrogate's sale. The objections to the sale and the defects in the proceedings appear from the opinion. The petition for the order of sale was without date or mark of filing. It stated that the administrators had "made a just and true inventory of all the goods, chattels, and credits of the estate of the said Henry Bloom, and also an estimate of the debts of the estate, all which, duly authenticated, is on file in the office of said surrogate," and that the personal estate was not sufficient to pay debts. The surrogate by whom this petition was heard and granted, having died prior to the trial of the present cause, such of the papers as could be found were produced by his successor in office. The inventory produced was dated February 21, 1819. On its back was an undated certificate by two appraisers that it was a true appraisal of the property of the deceased. The appraisers' oath annexed to the inventory was dated September 11, 1819. The oath of the administrators to the truth of the inventory was taken before the surrogate, but bore no date. The inventory showed goods and chattels appraised at six hundred and forty-nine dollars and eighty-one cents, and debts due amounting to three hundred and seventy-three dollars and fifty-six cents. An account and estimate showed debts of estate aggregating two thousand two hundred and thirty-five dollars and thirty-seven cents, and that the excess of the debts due, over the personal estate, was one thousand two hundred and twelve dollars. This account was verified by the oath of one of the administrators, taken May 11, 1820. On June 26, 1840, an order of sale was entered. No order appointing a guardian for the minors could be found.

The judge directed the jury to find for the plaintiffs; and the jury having so found, the defendant moved to set the verdict aside.

C. Humphrey, for the defendant.

B. Johnson, for the plaintiffs.

By Court, BRONSON, J. As the judge did not specify on what particular ground he held the sale under the surrogate's order void, it will be proper to examine the several objections which have been urged against the validity of the sale, on the argument. The counsel for the plaintiffs insists that the sale was void, on several grounds:

1. It is said that administration was not duly granted, because there was but one surety to the bond. The tenth section of the act of 1813 provides, that the surrogate shall, upon granting administration of the goods of any person dying intestate, take of the person or persons to whom such administration shall be granted, sufficient bonds to the people of this state, with two or more competent sureties: 1 R. S. 447, sec. 10. The duty of the surrogate is plain, but the omission to take two or more sureties is not a matter which goes to the foundation of the proceeding, so as to render the letters of administration void. Only two things were essential to the jurisdiction of the surrogate in granting administration, to wit, the death of the intestate, and the fact that at, or immediately previous to his death, he was an inhabitant of the same county with the surrogate: Sec. 3. If those facts existed in this case, which is not denied, the surrogate had authority to act, and the omission to take a proper bond, was an error to be corrected on appeal: Sec. 32; and not a defect of jurisdiction which would render the whole proceeding void.

2. It is said, that the application for a sale of the real estate was not accompanied by an account of the personal estate and debts of the intestate: that instead of an account made at that time of the personal estate, reference was had to the usual inventory which had been previously filed. This is an important point, because a petition and account are essential to the surrogate's jurisdiction in ordering a sale. The administrator is in all cases to make and exhibit an inventory of the personal estate, within six months after the grant of administration: Sec. 10. And without any reference to that provision, he must accompany his petition for a sale of land by an account of the personal estate and debts, as far as he can discover the same: Secs. 23, 26. If the general inventory had been previously filed, and there was no account beyond a reference to that document, it would not, I think, be sufficient, and the order to sell could not be supported. I have already remarked, that the requirement of an account is wholly independent of that relating to the inventory; the one must be furnished, although the other

may be on file. There is good reason for such a rule. The administrator, before the application for a sale, may have discovered personal estate of the intestate, of which he had no knowledge at the time the inventory was filed; debts due the intestate, which were deemed bad at the time of making the inventory, may have proved available, either in whole or in part; and property, which was appraised, may have advanced in value. It is therefore proper, as well as a plain requirement of the statute, that there should, in all cases, be an account at the time of the application for a sale of real estate.

But if an account is in fact presented, it can do no harm that it receives the name of inventory, instead of account. Nor do I think it necessary that there should be two separate documents, in a case where the common inventory is presented at the time of applying for a sale. When the inventory comes in at that time, it must necessarily contain the same matter that would appear by such an account as is mentioned in the twenty-third section; and one document may well answer the double purpose of inventory and account.

It becomes therefore important to inquire, when the inventory in this case was filed. It is dated in February, 1819; but it seems quite probable that it was not filed at that time, because there is an oath of the appraisers appended to it, which was sworn before the surrogate on the eleventh of September following. It may not have been filed on the last-mentioned day; for the oath then made was not to the truth of the inventory, as though that document had already been prepared, but the oath of each appraiser was, that "I will truly, honestly, and impartially appraise," etc. An account or estimate of the debts to be paid, was evidently presented to the surrogate at the time of applying for a sale. An affidavit of one of the administrators, purporting to have been sworn on the eleventh of May, 1820, the day before the order to show cause, was subjoined to this account, and the jurat was in the handwriting of the surrogate, though his name was not subscribed to it. The petition for a sale speaks of the inventory of the personal estate and this account of debts in terms which, to say the least, can not be made to imply that they were presented or filed at different times. There is, on the one side, little or no evidence to prove that the inventory was filed before making the order to show cause, and on the other, there is some evidence tending to show that it was filed at that time. And here the presumption that every officer does his duty, may, perhaps, be entitled to some weight: *Ford*

v. *Walsworth*, 19 Wend. 334; and would aid the conclusion, that the inventory was presented at the proper time for sustaining the jurisdiction of the surrogate. I do not think, however, that much importance should be given to that presumption, where, as in this case, it is resorted to for the purpose of making out a vital jurisdictional fact. But without it, there was some evidence for the jury. What they would have said, as to the time of filing the inventory, if the question had been submitted to them, I will not attempt to conjecture. I have only noticed the evidence far enough to show that there was a question for the jury; and it follows, that if the judge based his decision against the validity of the sale, on the ground that there was no account, there must be a new trial.

3. The next objection is, that before petitioning for a sale, the administrators had not applied the personal estate which had come to their hands towards the payment of the debts of the intestate. An inventory must be filed before asking for a sale, but it is enough if the personal estate has been applied to the payment of debts before a sale is ordered. The application may be made between the order to show cause, and the final order for sale: Sec. 26. In this case the amount of debts to be paid was two thousand two hundred and thirty-five dollars and thirty-seven cents; the personal estate amounted to one thousand and twenty-three dollars and thirty-seven cents: the balance, one thousand two hundred and twelve dollars, was struck by the surrogate, and probably at the time the petition was presented. In the order for a sale, the surrogate adjudges, that the personal estate was insufficient for the payment of debts, and that there yet remained due and unpaid of the debts, besides costs, the sum of one thousand two hundred and twelve dollars, which is the precise amount of debt that would remain unpaid if all the personal estate had been previously applied to that object. There is, therefore, some reason for believing that the personal estate had been properly applied before the order for a sale was made.

4. It is also objected, that nothing passed by the sale, in consequence of the defective and imperfect description of the land in the surrogate's order, and in the administrator's deed: Sec. 23. If there was nothing in the case beyond the words, "being ninety-one acres of the south-west corner of lot number eleven," there would be some difficulty in saying that all of the land passed which is in controversy in this suit. The description would be best answered by laying out ninety-one acres in a

square form on the south-west corner of the lot, which would not include more than forty acres of the land of the intestate, and would include about fifty acres of land belonging to some other person. But there is, I think, enough in the case to help the purchaser out of this difficulty. It was an order for the sale of the real estate of which Henry Bloom died seised, and there were to be ninety-one acres in a specified lot. The intestate owned precisely that quantity of land, and no more, in the designated lot, and his land touched the south-west corner of the lot, though it did not lie in a square form. The surrogate evidently had in view the particular parcel of land which the intestate owned in lot number eleven. The matter must have been well understood by all of the parties in interest, and I think the whole of the land in controversy might well pass by the deed.

5. If there was ground for imputing fraud to Abraham Bloom, the purchaser, that was a question of fact for the jury.

6. As the defendant did not enter under the plaintiffs, he was at liberty to show a title out of them, although he did not connect himself with that title.

7. The only remaining question is, whether the plaintiffs, who were infants at the time of the proceedings before the surrogate, and for whom no guardian was appointed, are concluded by the sale. We have been referred to the cases of *Jackson v. Robinson*, 4 Wend. 436, and *Jackson v. Crawfords*, 12 Id. 533, as deciding the point against the infant heirs. But I have been unable to discover that this question was involved, or even mentioned, in *Jackson v. Robinson*; and the decision in *Jackson v. Crawfords*, turned upon another ground. The objection was taken, in that case, that no guardian *ad litem* had been appointed for the infants; but such evidence was given in relation to what was done before the surrogate, and the probable loss of a portion of the papers, that the judge told the jury they would be warranted in presuming that all necessary proceedings had been duly had before the surrogate, and that guardians for the infant heirs had been duly appointed. On a motion for a new trial, Sutherland, J., who delivered the opinion of the court, said, "the parol evidence fully warrants the conclusion, that all the proceedings before the surrogate were strictly formal and regular." And again, "the presumption of the entire regularity of those proceedings is strengthened by the long acquiescence of the heirs at law." In the case at bar, although there is evidence enough that this business was loosely done, there is no evidence tending to show the loss of papers, and no foundation has been laid

for presuming the appointment of a guardian. It is in proof, that none was appointed, so far as appears from the records and papers in the surrogate's office. This is then a case where the question is directly and necessarily presented, and that too for the first time, so far as I have observed, whether infant heirs can be concluded under this statute without a guardian to appear for, and take care of their interests.

The surrogate undoubtedly acquired jurisdiction of the subject-matter, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction over the persons to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject-matter was not within its cognizance: *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Bigelow v. Stearns*, 19 Id. 39 [10 Am. Dec. 189]; *Mills v. Martin*, 19 Id. 7. This is the rule in relation to all courts, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears; whereas an inferior court, and those claiming under its authority, must show that it had jurisdiction: *Foot v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 Id. 40. The surrogate's court is one of inferior jurisdiction; it is a mere creature of the statute: *Dakin v. Hudson*, 6 Cow. 221. Indeed, it has been held in all the cases relating to surrogates' sales, that the person claiming under them must show affirmatively that the officer had acquired jurisdiction. The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void, in whatever court it was rendered.

It is not only a general principle in the law, that courts must acquire jurisdiction over the persons to be affected by their judgments, but in relation to these sales the statute has specially pointed out the means, and imposed the duty, of bringing the proper parties before the court. The surrogate, when the subject has been properly presented to him, must in the first place make an order directing all persons interested in the estate to appear before him at a certain day and place, to show cause why the real

estate should not be sold for the payment of debts; and this order must be published in two newspapers for four weeks successively: Sec. 23. This notice serves the purpose of bringing in all such persons as the law presumes capable of taking the charge of their own interests, and defending themselves in courts of justice; but it does not include infant heirs and devisees. The thirty-first section was made for their protection; and it provides, "that in all cases where a petition shall be presented by any executors or administrators, for the sale of the whole or part of the real estate of their testator or intestate, and one or more of the devisees or heirs of such testator or intestate shall be infants, the judge of the court of probates or the surrogate to whom the same may be presented, shall appoint some discreet and substantial freeholder a guardian of such infant or infants, for the sole purpose of appearing for, and taking care of the interest of such infants, in the proceedings therein." This mode of bringing in the infant heirs was not pursued, and the plaintiffs have had no day in court. Without it, they can not be deprived of their inheritance.

The cases to which I have already referred have settled a principle decisive of this question. But I will mention a few other decisions, for the purpose of showing that the prescribed form for obtaining jurisdiction of the person, whatever that form may be, must be strictly pursued. In the *Matter of Underwood*, 3 Cow. 59, the creditors of an insolvent debtor were to be brought in by the publication of a notice for ten weeks, and it was held, that the judge had no jurisdiction to grant a discharge where the notice had been published only six weeks. In *Denning v. Corwin*, 11 Wend. 647, a judgment of this court, in partition, was held void, because it did not appear by the record that the notice required by the statute in the case of unknown owners had been duly published. This case, so far as it asserts the doctrine that the judgment of a superior court will be void if the record do not show jurisdiction, has been overruled: *Foot v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 Id. 40. But the principle remains untouched, that whenever the want of jurisdiction appears, the judgments of any and all courts will be void; and when the party in interest is to be brought in by means of a public notice, the want of such notice will be a fatal defect.

In *Messinger v. Kintner*, 4 Binn. 97, a decree of the orphans' court was held void as against infants, for whom no guardian had been appointed pursuant to the statute. In *Smith v. Rice*,

11 Mass. 507, the statute required that the judge of the court of probates should appoint guardians for infants, and some discreet person to represent a party out of the state, and for want of such appointment, the proceedings were held to be void. This decision was fully approved in *Proctor v. Newhall*, 17 Id. 91. The rule that there must be jurisdiction of the person, as well as the subject-matter, has been steadily upheld by the courts; and it can not be relaxed without opening a door to the greatest injustice and oppression.

In every form in which the question has arisen, it has been held, that a statute authority by which a man may be deprived of his estate must be strictly pursued. In *Thatcher v. Powell*, 6 Wheat. 119, Marshall, C. J., said, it was a self-evident proposition, that no individual or public officer can sell and convey a good title to the land of another, unless authorized so to do by express law; and the person invested with such a power, must pursue with precision the course prescribed by law, or his act will be invalid. In accordance with this doctrine, the case of *Jackson v. Esty*, 7 Wend. 148, was decided. Savage, C. J., there says, "it is a cardinal principle that a man shall not be divested of his property but by his own acts, or the operation of law; and where proceedings are instituted to change the title to real estate by operation of law, the requirements of the law under which the proceedings are had, must be strictly pursued." In *Rea v. McEachron*, 13 Wend. 465 [28 Am. Dec. 471], a sale under this statute was held void for want of an order of confirmation by the surrogate; and in *Alkins v. Kinnan*, 20 Wend. 241 [32 Am. Dec. 534], the deed to the purchaser was held void, because it did not set forth at large, as the statute requires, the order of sale made by the surrogate. See also *Jackson v. Shepard*, 7 Cow. 88 [17 Am. Dec. 502]; *Williams v. Peyton*, 4 Wheat. 77.

The rule which requires a strict compliance with a statute authority under which a man may be deprived of his estate, is one of a most salutary tendency; and this is a much stronger case for its application than some of those which have been mentioned. I do not intend to say that there was any fraud in procuring this sale. That was a question for the jury. But I can not forbear to remark, that there were circumstances well calculated to awaken suspicion that all was not right; and if there had been a compliance with the statute, by appointing a guardian to appear and take care of the interest of the infant heirs, I think it far from being clear that their land would have

been sold. But however that may be, they could only be deprived of their inheritance by pursuing the forms prescribed by law.

It is said that the plaintiffs had a remedy by appeal; and it is true that the statute gives a party claiming to be aggrieved fifteen days to appeal from a decree or order of the surrogate: Sec. 32. But this argument was well answered by Jackson, J., in *Smith v. Rice*, 11 Mass. 512. He says, "the very grievance complained of is, that the party had no notice of the pendency of the cause, and of course no opportunity to appeal." He then proceeds to show, that when the judge of probate undertakes to determine the rights of parties over whom, for the want of notice, he has not acquired jurisdiction, and the parties have had no opportunity to appeal, they may consider the act or decree as utterly void.

When the proceedings are at common law, and an infant appears by attorney instead of guardian, or, after being served with process, suffers a default, the judgment will be erroneous—not void. But here there has been neither service of process nor appearance in any form. The judgment would have been void had the proceedings been at the common law; and it is clearly so in this case, where the defendant is attempting to build up a title under a statute, without complying with its requirements.

New trial denied.

ANY ACT OF A COURT IN A MATTER OVER WHICH it has not acquired jurisdiction is a nullity: *Ferguson v. Crawford*, 70 N. Y. 264; *Adams v. Saratoga & W. R. R. Co.*, 10 Id. 333; *Doty v. Brown*, 4 How. Pr. 430; *Visscher v. Hudson R. R. Co.*, 5 Barb. 46. Or, as it is sometimes expressed when it is meant to say that jurisdiction over the person of the defendant must be acquired, no person can be divested in a court of justice of any right unless, by notice having been previously given to him of the proceedings, an opportunity has been afforded him of being heard therein: *Williams v. Van Valkenburg*, 16 How. Pr. 147; *People v. Sutherland*, Id. 194. In this respect these cases recognize no distinction between courts of general and those of inferior jurisdiction. There is, however, a presumption indulged that the jurisdictional facts necessary to authorize the judgments and decrees of the courts of the former kind existed: See the cases cited above, and *Hutchinson v. Brand*, 6 Id. 74; though the presumption may be rebutted: Id. Whereas, wherever a right is claimed under the decree of a court of inferior jurisdiction, it is incumbent upon the claimant to prove affirmatively the jurisdictional facts: *Harrington v. People*, 6 Barb. 610. The surrogate's court being one of inferior jurisdiction, this rule applies to claimants under their decrees: *Mahoney v. Gunter*, 10 Abb. Pr. 437; *Corwin v. Merritt*, 3 Barb. 343; *Ackley v. Dygert*, 33 Id. 191; *Buhle v. Sherman*, 10 Bos. 305; *Sibley v. Waffley*, 16 N. Y. 190; see also the parallel case of *Atkins v. Kinnan*, 32 Am. Dec. 534 and note.

IRREGULARITIES AND ERRORS OF JUDGMENT in a proceeding over which a court has acquired jurisdiction, can not be taken advantage of in a collateral proceeding, even though the court be one of inferior jurisdiction: *Sheldon v. Wright*, 7 Barb. 42; S. C., 5 N. Y. 511; *Lawrence v. Parsons*, 27 How. 9; *People v. Halsey*, 37 N. Y. 346; *Richmond v. Foote*, 3 Lans. 252; *Van Rensselaer v. Cottrell*, 7 Barb. 129; S. C., 4 How. Pr. 378; *Wilkening v. Schmale*, 1 Hilt. 264; *Van Rensselaer v. Witbeck*, 7 Barb. 142; S. C., 4 How. Pr. 388.

TO GIVE THE SURROGATE JURISDICTION TO ORDER THE SALE OF REAL ESTATE it is necessary that an account should be presented with the petition: *Schneider v. McFarland*, 4 Barb. 144; *Small v. Cromwell*, H. & D. 155; *Van Nostrand v. Wright*, Id. 262; and if the heirs are infants, the appointment of a guardian is equally essential: *Chandler v. Northrop*, 24 Barb. 132; *Havens v. Sherman*, 42 Id. 640; *Schneider v. McFarland*, 2 N. Y. 461.

TO THE EXERCISE OF A STATUTE AUTHORITY by which a person may be deprived of his estate, it is necessary that every prerequisite should have been strictly complied with. An instance is afforded where lands are sold for taxes: *Leggett v. Rogers*, 9 Barb. 411; *Cruger v. Dougherty*, 43 N. Y. 120; *Hubbell v. Weldon*, H. & D. 145; but the rule is not confined to this authority; it is of general application: *Bangs v. McIntosh*, 23 Barb. 599; *Robinson v. Ryan*, 25 N. Y. 324; *Low v. Purdy*, 2 Lans. 424; *Sherwood v. Reade*, 7 Hill, 433; *Merritt v. Port Chester*, 71 N. Y. 312. There is, however, this qualification, that if something has been omitted which was manifestly inserted not for the benefit of the party whose estate is divested, but of some other person, he shall not be heard to complain: *Allen v. Commissioners*, 38 Id. 318; see also *Atkins v. Kinnan*, 32 Am. Dec. 534, and note 540.

Perhaps to this head may best be referred the cases which hold that where a statute prescribes the mode by which jurisdiction may be acquired, it must be strictly pursued or the proceeding will be a nullity: *People v. Board of Police*, 6 Abb. 164; 26 Barb. 485; *Van Slyke v. Sheldon*, 9 Id. 284; *Stanton v. Ellis*, 16 Id. 323; *Buffalo & S. L. R. R. Co. v. Erie Co.*, 48 N. Y. 99; *People v. Spencer*, 55 Id. 4; *Brown v. Mayor of New York*, 6 T. & C. 166.

TITLE IN A THIRD PERSON is a defense to an action of ejectment: *Tinkham v. Erie R. Co.*, 53 Barb. 396.

PUTNAM v. WISE.

[1 HILL, 234.]

IF LAND IS OCCUPIED ON THE SHARES, and the occupiers covenant to yield and pay to the owners one half of all the grain raised on the farm, to be delivered at a place designated, and one of the occupiers afterwards enters into an agreement with other persons to do certain work and to receive therefor one third of such occupier's share, all the parties are, until the grain is delivered and divided, tenants in common thereof, and not partners.

IF ONE TENANT IN COMMON SELL THE COMMON PROPERTY, his co-tenants may adopt the sale, and all the co-tenants may join in an action therefor in assumpsit for goods sold and delivered.

LETTING ON THE SHARES FOR A SINGLE CROP makes the parties tenants in common thereof.

PRIVILEGE OF PERSONS OCCUPYING LAND ON THE SHARES to have a renewal of their contract for a second year, does not change their contract into

one of leasing, so as to deprive the owners of their interest as part owners or co-tenants of the crops raised.

COVENANT TO PAY A FIXED QUANTITY OF WHEAT or other products of a farm for the use thereof, does not give the lessor any present interest in such product.

CONTRACT TO RENDER A MOIETY OF THE PRODUCTS OF A FARM for the use thereof, though containing apt words to make a lease, will not be construed as a leasing with a reservation of rent, but as a letting on the shares, which results in both owner and occupier having a present interest as tenants in common of the crop.

ASSUMPSIT. Collins and Farnam, being the owners of a tract of land, entered into an agreement, under seal, with Melendy and Edward Putnam, whereby the former purported "to lease and to farm let" such lands to the latter, and the latter, in consideration of the use of the land, covenanted "to yield, pay, and give one half of all the grain raised on the said farm, to be delivered at," etc. The contract contained other provisions, which sufficiently appear in the opinion of the court. Afterwards Edward Putnam entered into an agreement with S. S. and H. L. Putnam, by which the latter were to do certain work and furnish certain teams, and each to be entitled to one third of Edward Putnam's share of the crops, etc. Certain wheat raised on the farm was in 1838 sold by Edward Putnam to defendant Wise. It was afterwards delivered by Melendy and Edward and H. L. Putnam. The defendant claimed to have purchased as agent of one Bogart. On this point the evidence was conflicting. This action was brought by Collins, Farnam, Melendy, and Edward, S. S., and H. L. Putnam. The referee reported in favor of plaintiffs. Defendant moved to set aside the report.

D. B. Prosser, for the defendant.

H. Welles, for the plaintiffs.

By Court, COWEN, J. Whether the defendant purchased the wheat for himself or as agent of Bogert, was a question of fact for the referee, and the report should not be set aside as being against the weight of evidence in this respect. The other question is, whether the plaintiffs were joint owners of the wheat. There is no doubt that Edward Putnam might sell to the other two Putnams any share of the interest he held, which he might think proper; and there was sufficient evidence that he did sell to them such an interest as made them tenants in common with himself in the wheat in question. Edward Putnam and Melendy were the occupiers. They arranged that Edward Putnam should take two thirds of the products to be divided; and, by the sub-

contract, Edward let in the two younger Putnams to two thirds of his share. The agreement was, that they were to work so and so, and "each have and be entitled to one third of his, said Edward's, share," etc. There is evidence on which the referee might say there was a full performance by all the contractors and subcontractors. Everything seems, as between them, to have gone on harmoniously.

It is said, that Edward Putnam had no right to let in two additional partners, without the consent of all four of the original contractors. That is true, if they were partners. One partner can not receive another into the firm without the consent of all: *Kingman v. Spurr*, 7 Pick. 235, 237, 238; *Murray v. Kneeland*, 14 Johns. 318, 322. Independently of Collins and Farnam's (the owners') consent, the two subcontractors, S. S. and H. L. Putnam, would have become partners, only as between themselves and Edward Putnam: *Ex parte Barrow, in the matter of Slyth*, 2 Rose's Cas. Bankruptcy, 252, 254, 255; Colly. on Partn. 8, Am. ed. of 1839. But there was evidence from which the referee might infer the assent of the other contractors. No doubt all must have known of the subcontract, and all have chosen finally to adopt it, by joining in this action for the price of the wheat: *Vide Maule v. Duke of Beaufort*, 1 Russ. Ch. 349, and 7 Pick. 238, 239.¹

So far, I have assumed that the original contract, under which the farm was to be worked, created a partnership between the parties; but it did not. It looked merely to the ownership of the products, and not to a sale. We shall see in the sequel that the parties concerned were all tenants in common of these products; but in effect, it was certainly not more than a joint purchase. Had there been a provision for a joint sale, or joint commercial dealing in the products of the farm, or in carrying it on, it might have been different: Colly., *ut supra*, 23, 303. But there was not. Even a joint purchase of personal property does not make a partnership: Colly. on Partn. 8 a, 10-12, ed. of 1839. Such a purchase is said to create only a tenancy in common: *Jackson v. Robinson*, 3 Mason, 138, 141. But this is even less. It was, in effect, that one side should occupy the farm, and divide the crops, taking their share as a compensation for their labor. An agreement by two, to perform a job of work, the compensation money to be equally divided, does not make a partnership: Colly., *ut supra*, 12. Here was to be a division of the gross earnings of the farm; and in such a case, even had the

1. *Kingman v. Spurr*.

arrangement been to sell the crops in common, and divide the money, this would not have been, within the law of partnership, a sharing of profit and loss. A., owning a sawmill, agreed with B. to work it and divide the gross earnings equally. Held, not partners: *Ambler v. Bradley*, 6 Vt. 119. Phelps, J., said: "They never shared in profit and loss. The share which the occupier received, was a mere compensation for his labor. This point has been often determined:" *Bowman v. Bailey*, 10 Id. 170; S. P., *vide also Rich v. Penfield*, 1 Wend. 380, 384, 385, and *Loomis v. Marshall*, 12 Conn. 69 [30 Am. Dec. 596].

A sale by joint tenants or tenants in common may be made before severance of the property, by all actually joining in the sale, or it may be made by one for the benefit of all, and, in the latter case, the sale being recognized and adopted by the others, becomes an original sale by all: *Per Daggett, J., in Oviatt v. Sage*, 7 Conn. 99. The consideration may then be said to move from all jointly, whether tenants in common or joint tenants: *Ham. on Parties to Actions*, p. 18, London ed. of 1817; *Vaux v. Draper*, Sty. 156, 157, 203;¹ *Bell v. Chaplain*, Hardr. 321; *Bowman v. Bailey*, 10 Vern. 170, 172. If the defendant had taken the wheat tortiously, the owners, though but tenants in common, must all have joined in trover, or they might, according to the well-known right of election in such cases, all have brought assumpsit for goods sold and delivered. *A fortiori* may they do this, though the property have, in fact, been sold by one only.

We have, so far, assumed that all the plaintiffs were common owners of the wheat. I have shown that Selam S. and H. S. Putnam were, properly considered, at least, common owners with Edward Putnam and Melendy. It is equally clear that all were also common owners with Farnam and Collins, provided the original contract was, in legal effect, a mere letting on shares. If a technical lease, they were not; and I do not see any evidence, independent of the contract, which will make the ownership of the wheat common between the owners and occupiers. It therefore becomes necessary to examine the legal effect of the contract. Its words are in nearly the common form of a lease. The owners "have, and by these presents do lease and to farm let, all said land, to the said parties of the second part;" and in consideration, etc., the parties of the second part covenant with the owners, "to yield, and pay, and give to them one half of all the grain raised by them [the occupiers] on said farm, to be delivered at," etc., fixing the place.

1. *Vaux v. Steward*, Sty. 156, 157; *Vaux v. Draper*, Id. 203.

The owners were to keep a certain number of sheep on the farm, to be fed by the occupiers, furnish plaister, one half the grain and grass seed, etc.: The occupiers to have one half the wool, and to deliver the other half on the premises in good order. Various provisions were inserted, as to the mode in which the occupiers were to cultivate the farm. There is no evidence which required the referee to say, that the wheat in question had been actually severed, so as to be known as that of the owners or occupiers. On the contrary, he was entitled to say on the evidence, and so doubtless he concluded, that the defendant purchased the wheat as that grown on the farm, and received it without any division having been made. That being so, if the construction contended for by the defendant be correct, the alleged lessors were improperly made plaintiffs; and such a misjoinder will be fatal to this action.

The contract was under the seals of both the owners and occupiers, and if the right of the former to their share of the grain lay either in covenant simply, or in render, as it is technically called, they could take no present interest till severance and delivery at the place appointed. In such case the rule would apply, that so long as anything remains to be done by the vendor, such as measuring, weighing, etc., the property in the goods sold does not pass. And, indeed, whether the property in the wheat had passed or not, the objection would be equally fatal to the action. If it had passed, each of the parties owned in severalty, and should have sued for their respective shares. If not, the objection recurs, that the whole belonged to the occupiers, and adding the owners' names was a misjoinder of parties.

Taking the words of this contract according to their technical meaning, there is no doubt that they carried, on the one hand, an exclusive possession and interest in the land to the occupiers, with a right equally exclusive to the emblements. And had the rent consisted in any certain amount of grain and wool, in bushels or pounds, without saying from the farm, the owners could have claimed no property in either till delivery, or at least till a tender made. The occupiers might have maintained ejectment, even against the owners, during the term, and put them to their action of covenant as a remedy for their rent.

But it is insisted that inasmuch as the shares of the owners in the farm products were uncertain in amount, this made the parties tenants in common, at least in the productions thus to be grown and shared between them. That has been long and repeatedly held in respect to a letting on shares for a single crop:

Har? v. Celey, Cro. Eliz. 143; Spencer, J., in *Foote v. Colvin*, 3 Johns. 216, 221 [3 Am. Dec. 478]; *Bradish v. Schenck*, 8 Id. 151; *De Mott v. Hagerman*, 8 Cow. 220 [18 Am. Dec. 443]; *Bishop v. Doty*, 1 Vt. 37; and *vide Chandler v. Thurston*, 10 Pick. 205. So for a single year, the share of the several crops to be measured and rendered by the occupier, on the premises: *Caswell v. Districh*, 15 Wend. 379. In some of these cases, it was said there were not any such clear words of demise but that it was left open to pronounce the agreement general, to work on shares. It is obvious that the contract for the occupier to divide and render the owner's share by measure on the premises, was meant for no more than what the law would require to be done in some form, at least what is commonly done, by way of severing the interest of common owners in personal property. The contract between the parties was therefore not allowed to operate as a lease, the court saying in some of the cases, that where the question is open, the construction more beneficial for both parties is, that they meant to hold in common: See *per* Spencer, J., in *Foote v. Colvin*, 3 Johns. 216, 221 [3 Am. Dec. 478]; and especially *per* Nelson, J., in *Caswell v. Districh*, before cited.

The subcontract, mentioned in the report of the referee, between the Putnams, would come clearly within these cases, and as we have seen, make them tenants in common with the occupiers; for though the first contract contained a provision that it might continue for more than one year, and the subcontract was the same, yet the provision was but in the nature of a re-letting for the crop of the second year. Beside, although the cases seem to suppose, that in order to save the rights of the parties as tenants in common, the letting should be for only a single crop, or, which is about the same thing in this country, a single year, it is difficult to perceive why the same form of contract for two or more years would not continue the relation of tenants in common for the whole time. In *Rich v. Penfield*, 1 Wend. 380, 384, 385, the parties, owner and occupier, continued the working of a mill on shares for several years, and Sutherland, J., said he inclined to consider them tenants in common.

But to show that the relation of the parties to the original contract was that of lessors and lessees, and the covenant to deliver the grain was but an agreement to render a share by way of rent, we are referred to the case of *Stewart v. Doughty*, 9 Johns. 108, 113. There, the words of demise and covenant to pay a share of the crop, were almost literally, and clearly in

legal effect, the same as here; and the contract was held to be a lease. The only difference was, in the length of the term. There, it was five years, with a right in either party to terminate it on six months' notice; here, only one year, with the privilege in the occupiers to continue for another. The shortness of the term, I admit, may be evidence of an intent to hold the crop in common; but is that circumstance alone, able to overcome words of express demise and covenant to pay, which have a settled construction in the law? Had the covenant been to pay a fixed quantity, as one hundred bushels of wheat, or two tons of hay, etc., though to come out of the produce of the farm, it seems to be perfectly settled that the lessor would have taken no present interest whatever: *Dockham v. Parker*, 9 Greenl. 137 [23 Am. Dec. 547]; *vide* also *Newcomb v. Ramer*, 2 Johns. 421, in note. And there is considerable authority, which does not appear even to have been expressly repudiated, that a contract to render a moiety, especially where the contract is for a certain term, or for more than one crop, amounts to the same thing: *Welch v. Hall*, Bull. N. P. 85, Lond. ed. of 1788. Thompson and Livingston, JJ., in *Jackson ex dem. Colden v. Brownell*, 1 Johns. 267, 270, 271 [3 Am. Dec. 326.] And see *Hare v. Celey*, and *Stewart v. Doughty*, before cited.

Welch v. Hall has long been disregarded, and probably never was law. It held that a contract on shares for one crop amounted to a lease. What was said in *Jackson ex dem. Colden v. Brownell*, went on the distinction between letting on shares for a single crop, and for a year certain. In the latter case it was said to be a demise, because for a year. That view was overruled in *Caswell v. Districh*. In the latter case the contract was in words of demise for one year; not in the usual technical terms I admit, but clearly such as, at a money rent, would have been construed to mean the same thing. Yet the contract was denied to be a lease, and the denial put on the ground that the payment by way of rent was in moieties, to be measured and given by the tenant. Mr. Justice Nelson said, "the shares were of specific crops to be raised on the farm," and he adds, "this view of the contract should be maintained, unless otherwise clearly expressed." He thought the case distinguishable from *Stewart v. Doughty*, where the phraseology being that usual in leases, could not be got over by the agreement to pay in shares from the specific crops.

With deference, I have not been able to make any substantial distinction in the phraseology. Independently of the fact that

the render was confined to a share in the specific crop, it would, as appears to me, in both cases, have operated to make a lease. In *Caswell v. Districh*, the agreement was to let the defendant have the farm for one year. These, says Woodfall, are apt words to make a lease (Woodf. Land. & Ten. 7, Lond. ed. 1804), and so it was adjudged in *Whitlock v. Horton*, Cro. Jac. 91. The words in *Stewart v. Doughty* were no more; but if they were, Woodfall says, the most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise: Woodf. Land & Ten. 6, Lond. ed. 1804. It seems to me therefore, that *Stewart v. Doughty* was very much shaken, not to say entirely overturned, by *Caswell v. Districh*; at any rate, that the question is open, whether the clearest words of present demise may not be considered as inuring to make a mere tenancy in common, under a letting like the one before us. And I am of opinion that they may. The compensation here lies wholly in shares from the farm products: in these, the owners are to be compensated for the use of their land, and the occupiers are to be paid for their labor. Indeed, as it respects the second year, from the crop of which the wheat in question was taken, the words of letting are almost identical with those in *Caswell v. Districh*. But it is a case in which we ought not to tie ourselves up to the consideration of mere words. The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants, than tenants; each party taking an interest as common owners in the crops and other products, as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor: *Vide Maverick v. Lewis*, 3 McC. 211. The extent of such compensation or interest, is to be collected from the contract: *Vide Beaumont v. Crane*, 14 Mass. 400. This may be so framed as to secure an exclusive interest to the owner in certain products, such as the hay to be consumed on the farm; also an exclusive interest in the young animals to be fed there, till they come to be distributed. No doubt, any provision of this kind may be made, if not in fraud of the occupant's creditors: *Lewis v. Lyman*, 22 Pick. 437. But there being no such provision, a common ownership results in all products to be divided, in whatever form the provision may be for rendering or securing such products to either party. The true test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a tenancy in

common arises, at least in such products as are to be divided. The occupier being a mere servant, it is said can not bring trespass *quare clausum fregit*; but the owner only: *Hare v. Celey*, before cited; *Robertson v. George*, 7 N. H. 306, 308. His possession is that of the owner: *Id.*, and *Maverick v. Lewis*, before cited. He has no interest in the land which he can assign, and on his death, the contract would be at an end: *Id.* All these views seem to follow from *Caswell v. Districh*, and they are, some of them, ably sustained by the late case in Massachusetts: *Lewis v. Lyman*, before cited. Other cases certainly take opposite views: *Weems v. Stallings*, 2 Har. & J. 365; *Haskins v. Rhodes*, 1 Gill & J. 266. And we have already seen, that even our own cases may be considered as somewhat in conflict. The more modern and maturely considered cases, both in this state and in Massachusetts, go, I think, clearly to sustain the right, both of the owners and occupiers, in the case before us, to be considered tenants in common. Though the whole be drawn up in the form of a lease, and a render as of rent, it is after all but another mode of saying, that the occupiers shall work the farm for so long, and divide the profits with the owners.

It follows, that the purchase of the wheat by the defendant operated as a contract with all the plaintiffs, though it was made with only one of them. And though the whole transaction were conducted in his name, the evidence was quite sufficient to warrant the referee in finding that he acted as agent for his co-tenants.

The result is that the motion to set aside the report of the referee should be denied.

Motion denied.

AGREEMENTS FOR CULTIVATION OF LAND ON SHARES.—The cases are in almost hopeless conflict as to what is the true construction of an agreement between the owner and the occupier of land for its cultivation on shares, and as to the rights of the respective parties in the land and in the crops. Such contracts seem to be to a great extent unknown in England: *Moulton v. Robinson*, 27 N. H. 550; but they are very common in this country, and each state seems to have adopted a view of its own as to the proper interpretation to be put upon them.

CASES HOLDING THE PARTIES TENANTS IN COMMON ON CROP.—The doctrine of the later New York cases is undoubtedly that laid down in the foregoing opinion of Judge Cowen, and is the one adopted as preferable in *Freeman on Co-tenancy and Partition*, that "an arrangement to cultivate land on the shares is not a lease," and that "every form of agreement by which land is let to one who is to cultivate the same and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crops:" *Freeman on Co-tenancy and Partition*, sec. 100; *Taylor's Land. and Ten.*, sec. 24; *Foot v. Colvin*, 3 Am. Dec. 478; *De Mott v. Hagerman*, 18 Id. 443, and

cases cited in the note thereto; *Bradish v. Schenck*, 8 Johns. 151; *Otis v. Thompson*, H. & D. 131; *Oakley v. Schoonmaker*, 15 Wend. 226; *Dinehart v. Wilson*, 15 Barb. 595; *Harrower v. Heath*, 19 Id. 331. So in other states it is held that the parties to the agreement, in such a case, are tenants in common of the crops before a division: *Thompson v. Mawhinney*, 17 Ala. 362; *Smyth v. Tankersley*, 20 Id. 212; *Williams v. State*, 34 Ala. 167; *Smith v. Rice*, 56 Id. 417; *Brown v. Coats*, Id. 439; *Moulton v. Robinson*, 27 N. H. 550; *Daniels v. Brown*, 34 Id. 454; *Hatch v. Hart*, 40 Id. 93; *Wentworth v. Portsmouth etc. R. R. Co.*, 55 Id. 546; *Guest v. Opdyke*, 31 N. J. L. 552; *State v. Jewell*, 34 Id. 259; *Cooper v. McGrew*, 8 Or. 327; *Ferrall v. Kent*, 4 Gill, 209; *Fiquet v. Allison*, 12 Mich. 328; *Aiken v. Smith*, 21 Vt. 172; *Esdon v. Colburn*, 28 Id. 631. Of course, where besides the letting of the land the owner is to contribute farming implements, teams, sacks, a part or all of the seed, etc., there is additional reason for holding the parties tenants in common, if not even partners, in the crop which is to be divided between them: *Bernal v. Hovious*, 17 Cal. 541; *Walker v. Fitts*, 24 Pick. 191; *Delaney v. Root*, 99 Mass. 546; *Wells v. Hollenbeck*, 37 Mich. 504; *Johnson v. Hoffman*, 53 Mo. 204; *Lowe v. Miller*, 3 Gratt. 205. The principle that the relation between owner and occupier, under a contract for cultivation on the shares, is that of tenant in common as to the crops, applies also where the crops are to be sold and the proceeds divided instead of the specific products. The point is whether there is to be a division: *Freeman on Co-tenancy and Partition*, sec. 101.

It is not to be understood, however, from what is said on this subject in *Freeman on Co-tenancy and Partition*, *supra*, that the relations of landlord and tenant may not, in such a case, exist as to the land, although the parties may be tenants in common with respect to the crops. Indeed, it is expressly stated in many of the cases above cited, that the contract may be a lease so as to create the relation of landlord and tenant so far as the land is concerned, while as to the crops there is a tenancy in common between the occupier and owner. In the cases from New Hampshire above referred to, the doctrine is, that although a contract for farming land on the shares may constitute the parties to it landlord and tenant as to the land, the reservation of a share in the crops by the lessor is not by way of rent, although it may be termed rent, but is a reservation in lieu of rent, and as the lessor has a property in the produce of the land to that extent he is therefore a tenant in common with the lessee as to the crops: *Moulton v. Robinson*, 27 N. H. 550; *Daniels v. Brown*, 34 Id. 454; *Hatch v. Hart*, 40 Id. 93; *Wentworth v. Portsmouth etc. R. R. Co.*, 55 Id. 540. If, as is held in the principal case, the true test by which to determine whether or not there is a tenancy in common in the crops, lies "in the question whether there be any provision in whatever form for dividing the specific products of the premises," it would seem to be wholly immaterial whether the relation between the parties as to the land is that of landlord and tenant or that of owner and cropper. Undoubtedly, however, the parties to the contract may determine and regulate their rights thereunder both as to the land and as to the crops, in any manner that they please.

QUESTION HELD TO BE ONE OF INTENTION.—The question as to whether or not the parties are landlord and tenant, or merely owner and cropper, and as to whether they are tenants in common of the crop before division, or whether one or the other is the exclusive owner, it is held in many cases, must be determined by ascertaining the intention of the parties as expressed in the language they have used: *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Nicolls*, 39 Id.

372; *Walls v. Preston*, 25 Cal. 59; *Johnson v. Hoffman*, 53 Mo. 504. Says Endicott, J., in *Warner v. Abbey*, 112 Mass. 355: "In construing contracts for the cultivation of land at halves, it is impossible to lay down a general rule, applicable to all cases; because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties and their consequent remedies for injuries as between themselves. In some cases, the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease with rent payable in kind; in other cases he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of the one is the possession of the other, until division; or he may retain the sole possession of the land, and the other party may have the right to perform the labor and receive half the crops as compensation; or the two parties may become tenants in common of the growing crops, while no tenancy in common as such exists in the land: *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Id. 191; *Merriam v. Willis*, 10 Allen, 118; *Delaney v. Root*, 99 Mass. 546; *Cornell v. Dean*, 105 Id. 435."

CASES HOLDING OCCUPIER TO BE TENANT AND EXCLUSIVE OWNER OF CROPS BEFORE DIVISION.—In a large number of cases it is laid down in unmistakable terms that if in a contract for the cultivation of land on the shares there are clear words importing a present demise, or that the occupier is to have the exclusive possession of the land, or that he is to pay or deliver the owner's portion of the crops as rent, the relation between them is that of landlord and tenant: *Deaver v. Rice*, 34 Am. Dec. 388; *Woodruff v. Adams*, 35 Id. 122; *Walls v. Preston*, 25 Cal. 59; *Dixon v. Nicolls*, 39 Ill. 372; *Sargent v. Courier*, 66 Id. 245; *Froust v. Hardin*, 56 Ind. 165; *Blake v. Coats*, 3 G. Greene, 548; *Townsend v. Isenberger*, 45 Iowa, 670; *Haskins v. Rhodes*, 1 Gill & J. 266; *Symonds v. Hall*, 37 Me. 354; *Warner v. Abbey*, 112 Mass. 355; *Darling v. Kelly*, 113 Id. 29; *Hatchell v. Kimbrough*, 4 Jones, 163; *Watson v. Bryan*, 64 N. C. 764; *Harrison v. Rice*, 71 Id. 7; *Fry v. Jones*, 2 Rawle, 11; *Rinehart v. Olwine*, 5 Watts & S. 157; *Burns v. Cooper*, 31 Pa. St. 426; *Ream v. Harnish*, 45 Id. 376; see also Taylor's Land. & Ten., sec. 24, and note. In nearly all of these cases it is further distinctly held that the tenant under such a contract is the sole owner, and entitled to the exclusive possession of the crops before the landlord's share is severed and delivered or set apart for him. So where there is a fixed amount made payable out of the produce of the land; as, so many bushels of grain or so many tons of hay: *Dockham v. Parker*, 23 Am. Dec. 547. The principle upon which this holding rests is that the tenant is the owner of the soil during the term, and "he who owns the soil during the year owns the crop raised on it:" Rodman, J., in *Watson v. Bryan*, 64 N. C. 764. Before division, therefore, the landlord has no leviable interest in the crop: Id. If he enters and takes possession of the crop he is liable to the tenant in trespass or trover: *Haskins v. Rhodes*, 1 Gill & J. 266; *Blake v. Coats*, 3 G. Greene, 548; *Warner v. Abbey*, 112 Mass. 355. So he is liable in trespass for permitting breachy animals to break in and destroy the crop: *Froust v. Hardin*, 56 Ind. 165. The tenant, of course, may maintain trespass against a stranger for an injury to the land or crop without joining the lessor: *Larkin v. Taylor*, 5 Kans. 433; *Darling v. Kelly*, 113 Mass. 29. So he may sue third persons for pasturage without joining the lessor: *Cornell v. Dean*, 105 Mass. 435. Indeed, he has, upon this view, the same rights and powers as to the land and crop as any tenant at a money rent.

But even in those cases where it is held that a contract for the letting of land on shares may be construed a lease, it is conceded that the mere fact that certain terms appropriate to a lease may be used, will not always control in determining whether the agreement is a lease or a cropping contract: *Wells v. Preston*, 25 Cal. 59; *Harrison v. Ricks*, 71 N. C. 7. In the case last cited, Rodman, J., enters into an elaborate discussion of the question as to when an occupant of a farm on the shares is to be deemed a tenant and when a mere cropper, and lays down these rules: "1. If the contract clearly conveys the land to a lessee for a term, in the absence of some contrary and controlling provision, the lessee is a tenant. But generally when the contract is oral or inartificially drawn, it is left doubtful whether an estate in the land was intended to pass. In such case, the intent, one way or the other, must be inferred from the other provisions of the agreement. The use of the word 'rent,' as that the owner has 'rented' his land to another, has by itself little weight in the interpretation of an oral or inartificially and obscurely written contract. 2. If the occupier is to pay a money rent, the title to the crop must necessarily be in him, in order that he may convert it into money. He is therefore strictly a tenant. 3. If the occupier is to pay the landlord a share of the crop as rent, the property in the whole must be in him in order that he may make the division, and he is a tenant. This interpretation may, however, be controlled by other provisions; as, for example, by a positive agreement that the property in the whole shall be in the landlord, either that he may make the division, or that he may be secured by a lien. The stipulation for a lien must be either void, or it must make the occupier a cropper, as it was held to do in *State v. Burwell*, 63 N. C. 661. 4. If the landlord is to divide to the occupier his share, the property in the whole must be in the landlord, and the occupier is only a cropper: *Denton v. Strickland*, 3 Jones, 61."

This brings us to the consideration of the cases in which it has been determined that an occupant under a cropping contract has no property in the crop before it is divided and his share set off to him.

CASES HOLDING OCCUPANT TO BE "CROPPER," HAVING NO PROPERTY IN CROP BEFORE DIVISION.—A "cropper" is thus defined in *Fry v. Jones*, 2 Rawle, 11: "If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, and receives his share as the price of his labor." That is to say, if the general possession of the land remains in the owner, and the occupant cultivates it for a share of the produce as compensation, he is a cropper. The question, then, in every case of cultivation of land on the shares is, does the contract give the owner his share as rent, or the occupant his share as compensation? If the former, according to the cases above cited, the occupant is a tenant; if the latter, he is a cropper: *Denton v. Strickland*, 3 Jones, 61; *Haywood v. Rogers*, 73 N. C. 320; *Adams v. McKesson*, 53 Pa. St. 81; see also *Warner v. Hoisington*, 42 Vt. 94. In those states where a tenancy in common in the crops is not recognized, it is settled that a mere "cropper" has no property in the land or in crops before they are divided and his part set off to him: *McNeely v. Hart*, 10 Ired. 63; *Brazier v. Ansley*, 11 Id. 12; *State v. Burwell*, 63 N. C. 661. He can not before such division convey a legal title to the share which he is to receive under the contract: *McNeely v. Hart*, 10 Ired. 63. Nor can such share be subjected to the payment of his debts: *Brazier v. Ansley*, 11 Ired. 12. One employed to work on land for a share of the crops is a mere employee who may be discharged for cause: *Jeter v. Penn*, 28 La. An. 230; S. C., 26 Am. Rep. 98.

WHERE A PART OF THE PRODUCTS IS RESERVED BY THE LESSOR TO BE USED

ON THE FARM, as where the contract stipulates that all the hay raised on the land shall be fed out to the stock on the farm, although there may be provisions as to dividing the other products in certain proportions, it is clear that no property passes to the lessee in the part so reserved, but as to such part the occupant is merely the servant of the owner: *Lewis v. Layman*, 22 Pick. 437; *Jordan v. Staples*, 57 Me. 352. Or if the occupant takes any interest therein, it is merely the limited right to use it in the particular manner designated: *Moulton v. Robinson*, 27 N. H. 550. In *Heald v. Builders' Ins. Co.*, 111 Mass. 38, the contract between the owner and lessee of a farm provided that the hay raised on the farm should be fed out to the stock thereon, and that the lessee should not sell, dispose of, carry the same away, or suffer it to be carried away, without the lessor's consent. The lessee, however, sold to a third person, who went into possession to carry on the farm, and did not propose to remove the hay, or make any other use of it than that stipulated in the original contract. It was nevertheless determined that the purchaser had not insurable interest in the hay.

STIPULATION THAT PROPERTY OR POSSESSION OF CROP SHALL BE IN LESSOR.—Where in a contract for the letting of land on the shares it is expressly stipulated that the property, possession, or control of the crop is to be in the lessor until there is a division or until the crop is sold, it is clear that, until that time, the lessee has no interest which he can sell or mortgage, or which can be taken on attachment: *Pender v. Rhea*, 32 Ark. 435; *Wentworth v. Miller*, 53 Cal. 9; *Esdon v. Colburn*, 28 Vt. 631. A contrary conclusion was reached, however, in *Ross v. Swaringer*, 9 Ired. 481, where Pearson, C. J., holds, with the court below, that the crops belong to the tenant as an incident of his lease where the contract is a lease, and, therefore, that the lessor can not reserve property therein to himself; adopting the doctrine of Lord Coke that “the lessor can not reserve parcel of the annual profits, as the vesture or herbage of the land or the like, for that would be repugnant to the grant.” But this doctrine is clearly shown to be unsound in the learned opinion of Bell, J., in *Moulton v. Robinson*, 27 N. H. 550. Where a tenant being in arrears was notified by his landlord that he could not have the farm any longer, and thereupon informed the landlord that if he would let him remain a year longer he would let him have all the hops raised on the farm, and he would cure and bag them, it was held that the property in the hops was in the lessor, and that they could not be seized for the tenant's debt, thus clearly recognizing the principle that the property in the products of the farm may be regulated by agreement between the parties: *Kelley v. Weston*, 20 Me. 232.

WHETHER OWNER AND OCCUPIER MAY BE PARTNERS IN PRODUCTS OF FARM.—Undoubtedly, as laid down in the principal case, an ordinary agreement between the owner of land and the occupiers or persons employed thereon to cultivate the land on shares does not constitute them partners in the products: *Christian v. Crocker*, 25 Ark. 327; *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Id. 242. But it is equally undoubted that the parties may so frame their contract as to constitute a partnership between them. If they jointly engage in the enterprise of cultivating the land, one furnishing the land and farming utensils, and the other the labor and superintendence, sharing the expenses between them and agreeing “to divide the profits,” the contract possesses every element of a partnership: *Reynolds v. Pool*, 37 Am. Rep. 607; S. C., 84 N. C. 37; *McCrary v. Slaughter*, 58 Ala. 230. So, where the agreement was for one to furnish the farm and certain stock, provisions, and farming implements, and the other to provide certain laborers and give his personal attention to the direction and control of the farming operations,

and that "when the products are ready for market" the parties should "equally divide share and share alike," the arrangement was held to constitute "a sort of agricultural partnership:" *Lewis v. Wilkins*, Phil. Eq. 303. Similar agreements were held to constitute partnerships in *Holifield v. White*, 52 Ga. 567; *Adams v. Carter*, 53 Id. 160; *Autrey v. Frieze*, 59 Ala. 587. In *Taylor v. Bradley*, 4 Abb. App. Dec. 363, the agreement was to let a farm for a term of years, each of the parties to furnish part of the farming implements, materials, etc., and pay half the taxes, one of them to cultivate the land and receive certain supplies for his family out of the products, after which all products were to be equally divided, and the court held that the agreement was not to be regarded as a lease or as a contract for services, but as a special contract "partaking of the nature of an adventure." Woodruff, J., after reviewing the New York cases on the subject of farming on the shares, including *Putnam v. Wise*, declared that if the question were a new one he would "say unhesitatingly that each case ought to be chiefly governed by the language employed by the parties to express their intention."

The principal case has been cited in New York to sustain the following points:

AN AGREEMENT TO CROP LAND UPON SHARES constitutes the parties there-to tenants in common of the crop that is grown until a division has been effected: *Fiero v. Belts*, 2 Barb. 635; *Tanner v. Hills*, 44 Id. 429; *Wilber v. Sisson*, 53 Id. 262; *Burdick v. Washburn*, Id. 401; S. C., 36 How. Pr. 475; *Har-rower v. Heath*, 19 Barb. 337; *Otis v. Thompson*, H. & D. 131; *Decker v. Decker*, 17 How. 14; and if a party to such an agreement agree with another person for services to be performed for a share of his share, the latter also becomes tenant in common of the crop: *Tupp v. Riley*, 15 Barb. 335.

An agreement of this kind will not create the relation of landlord and tenant between the parties: *Armstrong v. Bicknell*, 2 Lans. 219. The true relation of the parties is that of master and servant even though the agreement is in form a lease with all proper technical words: *Dinehart v. Wilson*, 15 Barb. 497; *Taylor v. Bradley*, 4 Abb. App. 374; S. C., 39 N. Y. 138; *Russell v. Howard*, 32 How. 407. The possession will remain unchanged therefore, as the possession of the servant is that of the master: *Comstock v. Dodge*, 43 How. 106. The test of whether there is such an agreement is determined by the existence of any provision in the contract of the parties for the division of the specific products of the farm: *Dinehart v. Wilson*, *supra*, citing the principal case. That such an agreement will not constitute the relation of landlord and tenant between the parties, see *Bailey v. Fillebrown*, 23 Am. Dec. 531, and note, and *De Mott v. Hagerman*, 18 Id. 443.

TENANTS IN COMMON MUST JOIN in trespass or trover for the taking or conversion of the joint property: *Rice v. Hollenbeck*, 19 Barb. 665.

RIGHT TO WAIVER OF ACTION EX DELICTO IN FAVOR OF ACTION EX CONTRACTU.—The *dictum* in the principal case on this subject has been much referred to in subsequent cases. Originally it was held that the right to waive an action of trover in favor of an action of assumpsit was only to be allowed, where the tortfeasor had sold the goods: *McKnight v. Dunlop*, 4 Barb. 42; *Harpending v. Shoemaker*, 37 Id. 291.

This qualification has not prevailed. Assumpsit is now allowed wherever there is an unlawful detention or there has been a conversion: *Roth v. Palmer*, 27 Barb. 655; *Abbott v. Blossom*, 66 Id. 355; *Hind v. Darlington*, 7 How. Pr. 281; *Chambers v. Lewis*, 2 Hilt. 594; *Bliss v. Bliss*, 7 Bosw. 344; but this other restriction was suggested in *Osborn v. Bell*, 5 Denio, 373, that the action of assumpsit should not be allowed if the wrongful taking was

not intended by the party for his own benefit. The example presented by that case was of an illegal seizure by a tax collector, who was acting, however, in his supposed line of duty.

The tort may also be waived and assumpsit maintained for money obtained by extortion, oppression, or imposition: *Harway v. Mayor etc. of New York*, 1 Hun, 629; 4 T. & C. 168. Upon a similar principle the waiver of the part of a tort is allowed; so an action of replevin in the *detinet* may be maintained instead of in the *cepit*, though the original taking of the property was tortious: *Cummings v. Voice*, 3 Hill, 283.

The principal case is cited as to what is sufficient evidence of a ratification, in *Hall v. Fisher*, 9 Barb. 31.

CARY ET AL. v. SAMUEL AND WM. HOTAILING.

[1 HILL, 311.]

SALE PROCURED BY THE FRAUDULENT MISREPRESENTATION of the vendee in regard to his solvency, works no change of property, though the fraud be not indictable.

TRESPASS, REPLEVIN, OR TROVER MAY BE SUSTAINED BY VENDOR whose goods have been obtained from him by a fraudulent purchase.

POSSESSION OF TRUE OWNER CAN NOT BE DIVESTED by a tortious or fraudulent taking.

EVIDENCE—WHEN A PURCHASE IS CLAIMED TO HAVE BEEN FRAUDULANT, evidence of distinct fraudulent purchases made at or about the same time as the purchase under consideration, is admissible.

REPLEVIN for seventy-five barrels of flour, etc. Plea, *non cepit*. The flour had been sold in Albany by plaintiffs to William Hotailing, who sent it to his brother Samuel, in New York. Plaintiffs sought to treat the sale as void on the ground of false representations made by defendant William, regarding his solvency and credit. Plaintiffs were nonsuited. They moved for a new trial, having excepted, 1. To the refusal of the court to receive the evidence of Lyman Root, to show that the day before purchasing of plaintiffs, William Hotailing made other purchases on similar false representations; 2. To the ruling of the judge that the plaintiffs to recover must make out such a case as would justify the conviction of the defendants if indicted for obtaining goods upon false pretenses.

I. Harris, for the plaintiffs.

S. Stevens, for the defendants.

By Court, COWEN, J. Clearly, the proof tended to show that William Hotailing obtained the goods fraudulently; and it is not denied that fraud, especially if it be indictable, may so far avoid a sale that an action of trover will lie. It is denied, however,

that an action of trespass will lie; and it is said that, therefore, this action of replevin for a wrongful taking, which is strictly concurrent with trespass, will not.

The general doctrine is perfectly settled, that fraud avoids a contract of sale: *Bristol v. Wilsmore*, 1 Barn. & Cress. 514; *Kilby v. Wilson*, 1 Ryan & Moody, 178; *Root v. French*, 13 Wend. 570 [28 Am. Dec. 482]. These were all cases of buying goods, with a preconceived design of not paying for them. In the first, Abbott, C. J., said, "it prevented the property passing." In the second he said the same thing. And in *Root v. French*, Savage, C. J., states the same rule; but suggests a distinction as to the remedy, which was not in the case, and which, on more reflection, I am sure he would have repudiated. *McCarty v. Vickery*, 12 Johns. 348, on certiorari from a justice's court, decides that trespass will not lie in such a case; and even adds, that the property is changed. But no case is cited, nor any principle or analogy mentioned on which to rest either proposition. And there are numerous cases to the contrary. That the property does not pass, I add to the cases already cited, the following: *Allison v. Mathieu*, 3 Johns. 235, 238; *Van Cleef v. Fleet*, 15 Id. 147, 151; *Buffington v. Gerrish*, 15 Mass. 156 [8 Am. Dec. 97]; *Abbotts v. Barry*, 5 Moo. 98, 102; *Lupin v. Marie*, 2 Paige, 169; *Andrew v. Dieterich*, 14 Wend. 31; *Mowrey v. Walsh*, 8 Cow. 238; *Tamplin v. Addy*, Id. 239, note; Putnam, J., in *Badger v. Phinney*, 15 Mass. 364 [8 Am. Dec. 105]; *Irving v. Molley*, 7 Bing. 543; S. C., 5 Moo. & P. 380. All these cases hold, in terms, what was asserted by Dallas, C. J., in *Abbotts v. Barry*, viz.: "The sale being effected by fraud, it is clear that a sale of this description works no change of property. The wines must be considered as remaining in the plaintiffs, as the original owners."

This being so, the civil remedies of the party defrauded are clear, viz., trover, or replevin in the *detinet*; or trespass or replevin in the *cepit*, at his election. Trover will lie without demand and refusal, because the original taking is tortious: *Thurston v. Blanchard*, 22 Pick. 18, 20 [33 Am. Dec. 700]. I admit that *Buffington v. Gerrish* speaks nothing in favor of the remedy, as for a trespass; because, although the action was replevin, this has long since been holden in Massachusetts to lie for a mere unlawful detention: *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Baker v. Fales*, 16 Id. 147, 150, and cases cited at the last page: *Marston v. Baldwin*, 17 Id. 606. But for the purposes of the civil remedy, however it may be with the criminal, on the distinction between bailment and sale, the cases, with the

exception of *McCarty v. Vickery* are all one way, if we take the point as established, that neither works any change in the property of the goods. The general and absolute ownership still remains in the vendor or bailor; and not only the original interference with the property on the part of the vendee or bailee, but any subsequent acts of ownership on his part, may be considered as an unlawful or tortious taking: Putnam, J., in *Badger v. Phinney*, 15 Mass. 359, 364 [8 Am. Dec. 105], and in *Baker v. Fales*, 16 Id. 147, 150. The general owner holds the constructive possession of personal property; and this is sufficient to maintain trespass, though the actual possession be in another: Putnam, J., *ut supra*, *Putnam v. Wyley*, 8 Johns. 432 [5 Am. Dec. 346]; *Thorp v. Burling*, 11 Id. 285; *Aikin v. Buck*, 1 Wend. 466; *Root v. Chandler*, 10 Id. 110 [25 Am. Dec. 546]. It is said, that the owner consented to the taking, and were that so, it would undoubtedly be a sufficient answer. But consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake: Putman, J., *ut supra*, 15 Mass. 364; Poth. Obl., pt. 1, c. 1, sec. 1, pl. 19. This is plain enough with regard to executory contracts not under seal. They are, if obtained by fraud, mere nullities; and the defendant, when sued upon them, may say he did not promise, however full and formal may have been his ostensible promise. The rule has been as broadly laid down in respect to simple contracts of sale, by most of the cases already cited, respecting fraud in such contracts. In *Wilkins' case*, 1 Leach, 522, 523, 4th ed., Gould, J., said: "It is a rule of law, equally well known and established, that the possession of the true owner can not be divested by a tortious taking. So, where goods are taken from the true owner, by means of fraud." An act may be void as to one person, or for one purpose, though not as to another person, or for another purpose. It would not lie with the vendee to allege the fraud, and he might therefore be charged for the price, as a purchaser. Whether he shall be so charged, or treated as a trespasser, lies in the election of the injured party: Walworth, Ch., in *Lloyd v. Brewster*, 4 Paige, 541 [27 Am. Dec. 88]. So, in one case, it was held, that the contract of sale is not always void as against a *bona fide* purchaser from the fraudulent vendee: *Mowrey v. Walsh*, *ut supra*; S. P., *Rowley v. Bigelow*, 12 Pick. 307 [23 Am. Dec. 607]. In the latter case, Shaw, C. J., said: "They [the vendors] might treat the sale as a nullity, and reclaim their goods." At least, as between the immediate parties, the vendor may say to the vendee: "I was not the agent

of sale and delivery. You took the goods from me by means of false representations, and, in a legal sense, without my consent and against my will."

Even a contract under seal, executory or executed, may be treated as void, if fraud have been committed in procuring its execution. That the owner's mere manual delivery of goods, will not save the deliverer from the imputation of trespass, is illustrated in the case of a bailment obtained with an intent to deprive the owner of his property. The bailee is considered as the taker, and may be convicted of larceny, under an indictment alleging that he feloniously stole, took, and carried away the property, contrary to the owner's consent. The form of a sale, unless within the statute as to false pretenses, saves him from the charge of taking in a criminal sense; but for all civil purposes there is no delivery any more than in the case of bailment. In other words, for the purposes of a civil suit, the sale is void; though for the purposes of a criminal prosecution, it is voidable only. Within the issue of not guilty, in trespass, or *non cepit* in replevin, there is no more a taking in the case of the fraudulent bailment than in that of the fraudulent sale.

The degree of fraud, therefore, as whether it be indictable or not, is of no consequence on the question of nullity, when we speak in a civil sense. This was held in so many words, by the case of *Irving v. Motley*. That the fraud need not amount to the obtaining of goods under false pretenses, within the statute, Park, J., took particular pains to show, in consequence of what counsel had sought to infer from a previous case in the decision of which he had participated, viz., *Noble v. Adams*, 2 Marsh. 366. See the opinion of Park, J., 5 Moo. & P. 396.¹

Root's testimony should have been admitted. On questions of intent to defraud, other acts similar to the offense charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed as that which is in issue, are admissible with a view to the *quo amino*. The case of fraud is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge. The authorities are quite numerous, both in this and other courts. Most of them are citrd in Cowen & Hill's ed. of 1 Phil. Ev., note 333, p. 452; Id., note 352, p. 465. In *Irving v. Motley*, 7 Bing. 543; S. C., 5 Moo. & P. 380, such evidence was received to establish the very kind of fraud now in question before us. The reason for its reception was given by Alderson,

1. *Irving v. Motley*.

J.: *Vide* 5 Moo. & P. 398. *Rowley v. Bigelow*, 12 Pick. 307 [23 Am. Dec. 607], is also to the same point, in all respects: *Vide* also *Jackson ex dem. Bigelow v. Timmerman*, 12 Wend. 299; *McElwee v. Sutton*, 2 Bail. 128; *Lowry v. Pinson*, Id. 324 [23 Am. Dec. 140].

The result is, that the motion for a new trial should be granted, the costs to abide the event.

New trial granted.

THE PRINCIPAL CASE IS FOLLOWED in Hill's reports, by the case of *Olmsted v. Hotailing*, 1 Hill, 317, which presented a nearly similar state of facts, and was decided upon its authority; the only additional point decided being that if one member of a firm obtain goods by means of fraudulent representations, replevin lies against all the members of the firm.

A SALE OF GOODS OBTAINED BY FRAUD passes no title to the fraudulent vendee, and notwithstanding the sale, either replevin, trespass, or trover may be maintained against the latter: *McKnight v. Dunlop*, 2 Barb. 173; *Townsend v. Bogart*, 11 Abb. 61; *Dows v. Perrin*, 16 N. Y. 333. This has been often decided where the fraud consisted in false representations as to the solvency of the purchaser: *Coulding v. Davidson*, 26 N. Y. 606; *Van Kleeck v. Leroy*, 4 Abb. N. S. 433; *Wheaton v. Baker*, 14 Barb. 597; *Hunter v. Hudson River Iron & Mach. Co.*, 20 Id. 501; *Ladd v. Moore*, 3 Sandf. 591; *Scott v. Simmons*, 34 How. 67; *Van Neste v. Conover*, 20 Barb. 548. The fraud will be sufficient, though there are no false representations, if there was an intention not to pay for the goods, formed at the time of purchase: *Buckley v. Archer*, 21 Id. 589; *Roth v. Palmer*, 27 Id. 654. It is not necessary to invoke the operation of the rule, that the fraud by which the sale was procured was of an indictable nature: *Nichols v. Michael*, 23 N. Y. 570. The reason of these decisions is founded upon the consideration that a consent obtained by fraud is not the voluntary act of the vendor's mind. This reason applied to the case of a sale procured by the exercise of duress, will make of the vendee a trespasser *ab initio*, who may at once be sued in trover without the necessity of a demand: *Foshay v. Ferguson*, 3 Hill, 159. It will also follow from a like application of the rule, that trover may be maintained for goods obtained by the lender of money, under an usurious agreement: *Scroeppe v. Corning*, 5 Denio, 243; 6 N. Y. 111.

An assignee for the benefit of the creditors of a fraudulent vendee is in this respect in no better situation than his assignor: *King v. Fitch*, 2 Abb. App. 527; 1 Keyes, 444. Neither can an execution creditor who has levied upon the property uphold the sale: *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 485. Nor can such a creditor uphold the sale, though he has purchased at the sale under his own execution, if his bid does not equal the amount of his debt, and so does not require any disbursement upon his part: *De Voe v. Brandt*, 53 N. Y. 466. But such a sale can not be defeated as against a *bona fide* purchaser from the fraudulent vendee: *Keyser v. Harbeck*, 3 Duer, 391. Even an infant is liable *in tort* for obtaining goods with the intent of not paying for them, if at the time of his purchase he conceals his infancy: *Wallace v. Morse*, 5 Hill, 593.

This and kindred subjects are treated of at length in the note to *Thurston v. Blanchard*, 33 Am. Dec. 702; see also *Knowles v. Lord*, 34 Id. 525, in which it is decided that the position of an assignee for benefit of creditors of the fraudulent purchaser is no better than that of his assignor.

EVIDENCE OF OTHER SIMILAR FRAUDS perpetrated by defendant nearly contemporaneously are admissible in evidence against him, for the purpose of proving his *quo animo*: *Van Kleeck v. Leroy*, 4 Abb. N. S. 433; S. C., 37 Barb. 547; *Hersey v. Benedict*, 15 Hun, 287; *Miller v. Barber*, 66 N. Y. 568; *People v. Shulman*, 80 Id. 375; *Viele v. Goss*, 49 Barb. 98; *Lansing v. Russell*, 13 Id. 521; *French v. White*, 5 Duer, 259.

But this evidence is admissible only to prove the *quo animo*; proof of false representations to one firm to induce a sale by it affords no ground for the inference, that like representations were made to induce another sale effected nearly contemporaneously: *Murfrey v. Brace*, 23 Barb. 564; *Strong v. Place*, 33 How. 122; S. C., 4 Rob. 393.

But if the fraud relied upon is not upon false representations, but upon an intention of the purchaser not to pay for the goods, evidence of fraudulent misrepresentations made by him to other vendors about the same time, as to his credit, are admissible to prove his *quo animo*: *Hall v. Naylor*, 18 N. Y. 589; see also note to *Rowley v. Bigelow*, 23 Am. Dec. 613.

WHETHER REPLEVIN LIES WHERE THE DEFENDANT has parted with the possession of the property, is a question upon which the subsequent cases are not in accord. *Brockway v. Burnah*, 16 Barb. 311, held that it would, and followed the principal case in saying that the action of replevin is commensurate with trespass *de bonis asportatis*; but *Roberts v. Randel*, 3 How. Pr. 332; S. C., 3 Sandf. 707; *Drake v. Wakefield*, 11 How. Pr. 106, are the other way.

LARCENY MAY BE COMMITTED of goods obtained by fraud *animo furandi*: *Smith v. People*, 53 N. Y. 113.

THE PEOPLE v. ALEXANDER MCLEOD.

[1 HILL, 377, and 25 WENDELL, 483.]

DISCHARGE ON HABEAS CORPUS can not be obtained on the ground that the prisoner is innocent of the offense for which he is held under an indictment. The question of his guilt or innocence must, after indictment, be submitted to a jury.

PRISONER MAY BE ADMITTED TO BAIL on *habeas corpus*, if charged with murder by a coroner's inquest, but not after the finding of an indictment of a grand jury, because in the former case the court may look into the depositions, and in the latter the evidence is secret.

EXAMINATION INTO GUILT OR INNOCENCE of a prisoner must, on *habeas corpus*, even before indictment, be restricted to the proofs and depositions upon which he was committed.

HABEAS CORPUS.—STATUTE REQUIRING THE COURT TO EXAMINE the facts contained in the return, and into the cause of confinement, and if no legal cause of confinement is shown, to discharge the prisoner; and further providing that he may deny the material facts stated in the return, or allege any fact showing that his imprisonment is unlawful, or that he is entitled to a discharge, does not entitle him to go behind the indictment in a summary manner, and to try before the court the issue regarding his guilt or innocence of the offense of which he is there accused.

POWER TO ENTER A NOLLE PROSEQUI was, at common law, confided to the

attorney-general alone. Under our statutes it is delegated to the district attorneys, to be exercised with leave of the court.

COURT CAN NOT ORDER THE ENTRY OF A NOLLE PROSEQUI on affidavits and other proofs submitted by the prisoner, the district attorney having made no application for leave to make such entry.

ALIEN COMMITTING A CRIME HERE is amenable to our criminal law, in whatever manner he may have entered our territory.

LAWFUL WAR, by the law of nations, never exists without the concurrence of the war-making power.

WAR-MAKING POWER of the United States is congress; of England, it is the queen.

A STATE OF PEACE AND THE CONTINUANCE OF TREATIES IS PRESUMED by all courts of justice until the contrary is shown.

PRIVATE HOSTILITIES, HOWEVER JUST OR GENERAL, do not constitute a legitimate and public state of war.

WAR MAY BE PUBLIC, PRIVATE, OR MIXED. Private war is unknown in civil society, except so far as it may be exerted by way of defense between private persons. To public war, at least two nations are essential parties. Mixed war can be carried on only between a nation on one side and private individuals on the other.

RIGHT OF A NATION, OR ANY OF ITS CITIZENS, TO INVADE another nation and harm its property or citizens, does not exist until public war is lawfully denounced.

PUBLIC WAR IS OF TWO KINDS: 1. By public declaration; 2. By war denounced without such declaration. The first is called solemn or perfect war, and extends to all the inhabitants of both nations. The second is styled unsolemn or imperfect war, because made by special declaration, and limited to particular objects, beyond which it does not authorize measures of hostility.

EMPLOYMENT OF SOLDIERS TO AID IN EXECUTING PROCESS or in punishing or arresting individuals does not constitute a state of public war.

SOLDIERS OR OFFICIALS OF ONE NATION HAVE NO RIGHT TO ENTER THE TERRITORY OF ANOTHER in pursuit of a criminal, nor for the purpose of attacking or capturing an enemy.

JURISDICTION OF A NATION WITHIN ITS OWN TERRITORY is exclusive and absolute, and every hostile entry into neutral territory is necessarily unlawful.

AN ENGLISH SUBJECT WHO UNDER THE DIRECTION OF THE LOCAL CANADIAN AUTHORITIES commits a homicide in the United States in time of peace, may be prosecuted here therefor, though his sovereign affirms his conduct and avows that the directions under which he acted were lawful acts of his government.

SELF-DEFENSE, PLEA OF, not sustained where the party shows that he himself was the aggressor and made the attack, or that he acted in retaliation.

IF A FOREIGNER ENGAGES IN PRIVATE WAR, he may be repelled when he comes with violence; but we have no right to assault him whilst the mischief is in machination only, or to revenge ourselves upon him after he has committed it.

PERSONS ACTING IN THE TERRITORY OF ANOTHER NATION, in time of peace, though upon the command of their government, and being then beyond the jurisdiction of the government for which they act, must be

treated as proceeding on their own responsibility, and may be prosecuted as criminals in the courts of the nation thus entered, though their own government adopts and approves their crime.

LAWS OF A NATION can not extend beyond its own territory.

SOLDIER IS NOT BOUND TO OBEY HIS SOVEREIGN, by going into a neighboring nation, during time of peace, and there committing an unlawful act.

SPIES AND OTHER PERSONS UNDERTAKING THE COMMISSION OF CRIMES not authorized by public war, are not protected by the command of their superior from punishment in the tribunals of the nation whose laws are violated.

APPROVAL OF HIS SOVEREIGN DETRACTS NOTHING from the criminality of the subject who has committed a crime in a foreign country during time of peace. The case of ambassadors forms an exception to this rule.

DIPLOMACY IS NOT AN EXECUTIVE BUT A JUDICIAL FUNCTION; and the joint diplomacy of two nations can not oust the courts of one of them from trying a person accused of committing a crime.

WHETHER OR NOT FACTS ALLEGED IN JUSTIFICATION OF HOMICIDE EXIST is the province of the jury to determine, and not a question to be decided on *habeas corpus*.

HABEAS CORPUS to obtain the discharge of Alexander McLeod. The return of the sheriff showed that the prisoner was held under an indictment found by the grand jury of Niagara county, charging him with the murder of Thomas Durfee. The indictment was in due form, and was annexed to the return. In behalf of the prisoner an affidavit was read showing that about the middle of December, 1837, two or three hundred men from the state of New York, commanded by Rensselaer Van Rensselaer, took forcible and hostile possession of Navy island, in Niagara river, in the province of Upper Canada, organized and defended themselves in warlike manner against the Canadian authorities, and made war on her majesty's subjects by discharging cannon and otherwise; that they were supported by citizens of the United States, and their object was to cause a revolution, and to separate said province from the government of Great Britain; that a force of about two thousand five hundred men assembled under the authority of the provincial government and engaged in hostilities with the forces on Navy island, but were unable to dislodge them until January 16, 1838; that on the twenty-ninth of December 1837, the steamboat *Caroline*, proceeding from Buffalo or Black Rock, landed military stores on Navy island, and commenced plying between that island and points in the state of New York, transporting men, provisions, and implements of war to the forces on the island; that an expedition was then fitted out, under the direction of Colonel Allen McNabb of her majesty's forces, for the purpose of taking and destroying said boat, wherever found; that early on the thirtieth

of December the forces of such expedition attacked said boat at Schlosser in said state, and in such attack, and while acting under their commanding officer, one Amos Durfee, then on said boat, was shot and killed; that the attack, and destruction of the boat, and all acts relating thereto, including the killing of Durfee, had been approved and adopted by the government of Great Britain, as a necessary act of self-defense; that a correspondence between the United States and Great Britain, in relation to the destruction of the boat and demanding reparation, had been opened; and that deponent was not engaged in the expedition, nor did he take any part therein, nor in the killing of Durfee. Certain published correspondence between the two governments and various official documents were referred to in the affidavit, and annexed thereto. The correspondence between the two governments commenced January 4, 1838, and seems to have been closed April 24, 1841. The first letter mentioning McLeod was from Mr. Fox on the part of the British government. It was dated December 13, 1840. It requested the United States to take prompt steps for the release of McLeod; stated that the destruction of the *Caroline* was a public act of persons in her majesty's service, obeying their superior officers, and could not, therefore, be made the ground of legal proceedings against the individuals concerned, and that it was notorious that McLeod was not one of the parties participating in the destruction of the *Caroline*. Mr. Forsyth, in replying on behalf of the United States, insisted that the alleged offense was committed within the jurisdiction of the state of New York; that the transaction resulting in the destruction of the *Caroline* and the killing of Durfee was an unjustifiable invasion, in time of peace, of the territory of the United States; that the United States was aware of no principle entitling parties accused, of any exemption from trial before the judicial tribunals of the country, and the executive was not authorized by the constitution and laws of the United States to interfere with the action of those tribunals by requiring them to release persons duly indicted and held for trial; that though the avowal of the act might entitle the United States to apply to Great Britain for redress, it "can not deprive the state of New York of her undoubted right of vindicating, through the exercise of her judicial power, the property and lives of her citizens." Mr. Fox, in his letter of March 12, 1841, again demanded the immediate release of McLeod; and avowed the adoption and approval of his government of the attack upon and destruction of the *Caroline*; and denied that

the release was a question for the tribunals of New York. The response of Mr. Webster on the part of the United States stated "that her majesty's government must be fully aware, that in the United States, as in England, persons confined under judicial process can be released from that confinement only by judicial process. In neither country, as the undersigned supposes, can the arm of the executive power interfere, directly or forcibly, to release or deliver the prisoner. His discharge must be sought in a manner conformable to the principles of law and the proceedings of courts of judicature." Mr. Webster, while thus leaving the question with the courts, seemed to entertain no doubt that the avowal of the act by the English government would result in the acquittal of McLeod. On this subject he said: "The government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it. And the president presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, can not desire the punishment of individuals when the act complained of is declared to have been the act of the government itself. The indictment against McLeod is pending in a state court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government. He demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized states is to be respected in all courts. None is either so high or so low as to escape from its authority in cases to which its rules and principles apply." Affidavits on the part of the people were read tending to show that McLeod was present at the attack on the *Caroline*, participated therein, shot Durfee, and afterwards admitted that he had done so.

A. Bradley and J. A. Spencer, for the prisoner.

Willis Hall, attorney-general, contra.

By Court, COWEN, J. The prisoner's petition, on which I allowed this writ, contained an intimation that his commitment to the jail of the county of Niagara had not been regular; but that ground is now abandoned. The sheriff returns an indictment for murder, found by a grand jury of that county against

the prisoner, on which he appears to have been arraigned at the court of oyer and terminer holden in the same county. It further appears that he pleaded not guilty, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Durfee by the prisoner, on a certain day, and at a certain town within the county.

These facts, although officially returned by the sheriff, were, by a provision in the *habeas corpus* act, 2 R. S. 471, 2d ed., sec. 50, open to a denial by affidavit, or the allegation of any fact to show that the imprisonment or detention was unlawful. In such case, the same section requires this court to proceed in a summary way to hear allegations and proofs in support of the imprisonment or detention, and dispose of the party as the justice of the case may require. Under color of complying with this provision, which is of recent introduction, the prisoner, not denying the jurisdiction of the court over the crime as charged in the indictment, or the regularity of the commitment, has interposed an affidavit stating certain extrinsic facts. One is, that he was absent, and did not at all participate in the alleged offense; the other, that if present and acting, it was in the necessary defense or protection of his country against a treasonable insurrection, of which Durfee was acting in aid at the time.

Taking these facts to be mere matters of evidence upon the issue of not guilty, and, of themselves, they are clearly nothing more, I am of opinion that they can not be made available on *habeas corpus*, even as an argument for letting the prisoner to bail, much less for ordering his unqualified discharge. That this would be so on all the authorities previous to the revised statutes, his counsel do not deny. The rule of the case is thus laid down in the British books: "A man charged with murder, by the verdict of a coroner's inquest, may be admitted to bail; though not after the finding of an indictment by the grand jury:" 1 Ch. Cr. Law, 129, Am. ed. of 1836; Petersd. on Bail. 521, S. P. It has never, that we are aware, been departed from in practice under the English *habeas corpus* act. Lord Chief Justice Raymond said in *Rex v. Dalton*, 2 Str. 911, that he would bail, though a coroner's inquest had found the crime to be murder; and the distinction was, between the coroner's inquest, where the court can look into the depositions, and an indictment, where the evidence is secret: *Lord Mohun's case*, 1 Salk. 104, S. P. This reason is adopted by Chitty, at the page of his Cr. Law before cited; and by Petersd. on Bail., Lond. ed. of 1835, p. 521. It was also recognized by Sutherland, J., of this

court, in 1825: *Tayloe's case*, 5 Cow. 56. He says, "the indictment must be taken as conclusive upon the degree of the crime:" Id.

The depositions heretofore taken in the cause being thus cut off, there are no means of inquiry left to us on this motion, by which we can say, whether a murder was in fact committed, or whether the charge would probably be mitigated on the trial to a very doubtful case of manslaughter, or to a homicide in defense, or whether all participation might be disproved by showing a clear *alibi*. Nothing is better settled, on English authority, than that, on *habeas corpus*, the examination as to guilt or innocence can not, under any circumstances, extend beyond the depositions or proofs upon which the prisoner was committed. This would be so, even on *habeas corpus* before an indictment found, however loosely the charge might be expressed in the warrant of commitment. Chitty, at the page before cited, says: "It is in fact to the depositions alone that the court will look for their direction: where a felony is positively charged, they will refuse to bail, though an *alibi* be supported by the strongest evidence." He cites *Rex v. Greenwood*, 2 Str. 1138, a case of robbery, and eight credible witnesses making affidavit that the prisoner was at another place at the time when the robbery was sworn to have been committed; yet, adds the report, the court refused to admit him to bail, but ordered him to remain till the assizes. Here the crime is clearly proved by the depositions which have been read on the side of the people, while, instead of eight witnesses to an *alibi*, we have the solitary affidavit of the prisoner. In *Rex v. Acton*, 2 Str. 851, it was alleged that the prisoner had before been tried for a murder and acquitted. Afterwards, on proof of facts exactly similar to those in question at his former trial, a justice of the peace issued a warrant charging him with another murder; and he was again committed. On his being brought up by *habeas corpus*, his counsel offered to show his former acquittal; yet the court refused to hear the proof: S. C., 1 Barnardist, K. B. 250. On the authority of this case, Mr. Chitty, at the page of his book just cited, lays down the rule, that the court will not look into extrinsic evidence at all. He states a case wherein the same question came up in respect to an inferior crime—receiving stolen goods with a guilty knowledge. The prisoner's affidavit denied his knowledge; yet the court refused to bail, saying the fact of knowledge was triable by a jury only. They added, it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their

case before the court: Petersd. on Bail. 522, refers to Chitty, who cites Cas. K. B. 96. This book, *eo nomine*, does not appear now to be extant; and 12 Mod., the only reference I am aware of which, among the English quotations, is synonymous with Chitty's, does not appear to contain the case stated by him. But it accords with many others in circumstance; and the reason given is almost too plain to demand any direct authority.

To hear defensive matter through *ex parte* affidavits, as a ground for bailing the prisoner, would be to trench on the office of the jury; for in the case of high crimes bail would be equivalent to an acquittal. Accordingly the rule as laid down in *Horner's case*, 1 Leach, 270, 4th London ed. 1815, is, in effect, the same with that stated by Chitty. The prisoner had been committed under a charge of defrauding and robbing a man of his money by false pretenses. It was insisted that the facts stated in the depositions for the king made out a mere misdemeanor, and that the prisoner was therefore entitled to bail. But the transaction by which the money was obtained admitted of one construction which might make it a felonious taking. The court said: "In cases of this kind the course has always been to leave it to the jury to determine *quo animo* the money was obtained. In such a case the court never form any judgment whether the facts amount to a felony or not; but merely whether enough is charged to justify the detainer of the prisoner and put him upon his trial."

The cases I have noticed were, in several respects, stronger for the prisoner than the case before us. They were mostly founded on charges of a character much less serious than murder. They were all before indictment found; some of them presented a state of things on which it was plainly impossible to convict; and last, though not least, they were mere applications for bail; a thing which McLeod does not ask for. He demands an absolute discharge, on grounds upon which, according to the laws of England, he would not even be entitled to bail. The law of England formed, in this respect, the law of New York, until our new *habeas corpus* act took effect.

It becomes necessary next to inquire whether the new statute has worked any enlargement of our powers beyond what we have seen they were up to the time when it passed. The 2 R. S. 469, 2d ed., secs. 40, 41, require us to examine the facts contained in the return, and into the cause of the confinement of the prisoner; and if no legal cause be shown for it, or for its continuation, we are to discharge him. That here is legal cause,

viz., an indictment for murder, and an an order of commitment, we have seen, is not denied. By the forty-fifth section, p. 470, if it appear that the party has been legally committed for any criminal offense, we are required to let him to bail, if the case beailable. But so far, we have no direction as to what case shall be consideredailable. We are left under the restraints which I have noticed as existing before the statute. Not one of them is removed by it.

Then comes section 50, p. 471, which is relied on by the prisoner's counsel. I briefly noticed this, in proposing the question to be considered. But the prisoner is entitled to the benefit of it entire. The words are, that "the party brought before such court or officer, on the return of any writ of *habeas corpus*, may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed in a summary way, to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require." Under this statute the prisoner's counsel claim the right of going behind the indictment, and proving that he is not guilty by affidavit, as he may by oral testimony before the jury. We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English criminal courts. And we are not disposed to admit its adoption by our legislature, without clear words or necessary construction.

We think its object entirely plain, without a resort to the rules of construction. Its words are satisfied by being limited to the lawfulness of the authority under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain, by considering the evil which the statute was intended to remedy. At common law, it was doubtful whether the prisoner could question the truth of the return, or overcome it, by showing extrinsic matter upon the point of the authority to imprison. The statute was passed to obviate the oppression that might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or if true, depending for its validity on the act of a magistrate or court which can be shown by proofs *aliunde* to

have been destitute of jurisdiction: *Watson's case*, 9 Adol. & El. 731; 3 R. S. 784, 785, 2d ed., app., note. An innocent man may be, and sometimes unfortunately is, imprisoned. Yet his imprisonment is no less lawful than if he were guilty. He must await his trial before a jury. There are various cases in which the enactment, allowing proof extrinsic to the return, may have effect without supposing it applicable here. It must, I apprehend, for the most part, apply to cases where the original commitment was lawful, but in consequence of the happening of some subsequent event, the party has become entitled to his discharge; as, if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only. So, after conviction, he may allege a pardon, or that the judgment under which he was imprisoned, has been reversed. Nor is it necessary to inquire how far we might be entitled to go, were the prisoner in custody on the mere examination and warrant of a committing magistrate.

But it is said, we have power to direct the entry of a *nolle prosequi*, and it is our duty to look into the merits of the case with a view to decide whether it be a proper one for the exercise of that power. This proposition is also put upon a new section of the revised statutes, which most clearly gives no color for the suggestion. At common law, the attorney-general alone possessed this power, and might, under such precautions as he felt it his duty to adopt, discontinue a criminal prosecution in that form at any time before verdict. The power and practice under it are laid down in 1 Chit. Cr. Law, 478, ed. before cited. It probably exists unimpaired in the attorney-general to this day; and it has been by several statutes delegated to district attorneys, who now represent the attorney-general in nearly every thing pertaining to indictments, and other criminal proceedings, local to their respective counties. The legislature finding the power in so many hands, and fearing its abuse, by the 2 R. S. 609, sec. 54, 2d ed., provided, that it should not thereafter be lawful for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way discontinue or abandon the same, without leave of the court having jurisdiction to try the offense charged. This provision, the prisoner's counsel contended, so enlarged our powers that we might arbitrarily interfere on the prisoner's affidavit and other proofs verifying his innocence, or even on grounds of national policy, as where the prosecution would be likely to affect our foreign relations unfavorably; and that too, in despite of the attorney-general and district attorney.

Conceded as it was, that before the revised statutes, we had no right to give such direction, the argument seeks to draw from the statute giving us a veto against the *nolle prosequi*, a positive power to compel its entry. Even if we had such power, the argument would be quite extraordinary. It demands that we should finally dispose of an indictment for murder, on the sort of evidence by which we are guided upon a motion to set aside a default, or change a venue. In any view, this question belongs primarily to the executive department of the government.

I shall have occasion to inquire hereafter, whether these views should not be regarded as a final answer to this application. That will depend on the question, whether the facts stated on the part of the prisoner, supposing them to be admissible at all, are proper for the consideration of the jury only; or whether, as counsel have insisted with great zeal, they are such as to divest our criminal courts of all jurisdiction, either over the subject-matter, or person of the prisoner. We should, as we thought at the close of the argument, have felt ourselves entirely satisfied to dispose of the case on the first question, without looking any farther into the nature of the transaction out of which this indictment has arisen. But, as counsel made the question of jurisdiction their main topic, we preferred to preserve the case, and have looked into it as far as possible during a very short vacation, consistently with other pressing judicial avocations.

Want of jurisdiction has not been put on the ground that McLeod was a foreigner. An alien, in whatever manner he may have entered our territory, is, if he commit a crime while here, amenable to our criminal law: Lord Mansfield, in *Campbell v. Hall*, Cowp. 208; Vattel, b. 2, c. 8, secs. 101, 102; Story's Conf. of L. 518, 2d ed. Nay, says Locke, though he were an Indian, and never heard of our laws: Locke on Civ. Gov., b. 2, ch. 2, sec. 9. But it is said, his case belongs exclusively to the forum of nations, by which, counsel mean the diplomatic power of the United States and England, or in the event of their disagreement, the battle-field. I have already admitted that counsel may, under the fiftieth section of the *habeas corpus* act, allege and prove a want of jurisdiction. To show this, the affidavit of McLeod is produced, from which the inference is sought to be raised, that the Niagara frontier was in a state of war against the contiguous province of Upper Canada; that the homicide was committed by McLeod, if at all, as one of a military invading expedition, set on foot by the Canadian authori-

ties, to destroy the boat *Caroline*; that he was a British subject; that the expedition crossed our boundary, sought the *Caroline* at her moorings in Schlosser, and there set fire to and burned her, and killed Durfee, one of our citizens, as it was lawful to do in time of war.

We need not stay to examine the conclusion, viz., a want of jurisdiction, if the premises be untrue. To warrant the destruction of property, or the taking of life on the ground of public war, it must be what is called lawful war, by the law of nations, a thing which can never exist without the actual concurrence of the war-making power. This, on the part of the United States, is congress; on the part of England, the queen. A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown; and this is *presumptio juris et de jure*, until the national power of the country in which such courts sit, officially declares the contrary. A learned English writer on the law of nations makes this remark (1 Ward's Law of Nations, 294): "Although I am aware that there is a great authority for the contrary opinion, yet it is upon the whole settled, that no private hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. So far, indeed, has my Lord Coke carried this point, that he holds, if all the subjects of a king of England were to make war on another country in league with it, but without the assent of the king, there would still be no breach of the league between the two countries:" 1 Bl. Com. 267, S. P. Again, in *Blackburne v. Thompson*, 15 East, 81, 90, Lord Ellenborough, Ch. J., delivering the opinion of the court of king's bench, said: "I agree with the master of the rolls, in the *Case of the Pelican*, 1 Edw. Adm. R., Append. D., that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it; and that it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations. But when the crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question:" 3 Camp. 66, 67, S. C. and S. P.

So far were the two governments of England and the United States from being in a state of war, when the *Caroline* was destroyed, that both were struggling to avoid such a turn of the excitement then prevailing on the frontier, as might furnish the least occasion for war. Both had long maintained the relations of national amity: and have done so ever since under an actual

treaty. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while on our side, we have inflicted legal punishment on the leaders of the expedition, of which Durfee made a part, on the ground that England was then at peace with us. Whatever hostile acts she did, were aimed exclusively at private offenders; and if there was a war in any sense, the parties were England on one side, and her rebel subjects, aided by certain citizens of our own, acting in their private capacities, and contrary to the wishes of this government, on the other.

In speaking of public war, I mean to include, all national wars, whether general or partial; whether publicly declared, or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country, and directed against the power of another; whether the directions relate to reprisals, the sieges of towns, the capture or destruction of private or public ships, or the persons or property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object the exercise of some influence or control over the adverse nation as such. I deny that public war in this sense can be made out by affidavit, or by any other medium of proof than the denunciation of war by one or both of the two nations who are parties to it.

There are but three sorts of war, public, private, and mixed: Grot., b. 1, c. 3, sec. 1. Private war is unknown in civil society except where it is lawfully exerted by way of defense between private persons. To constitute a public war, at least two nations are essential parties, in their corporate capacities. Mixed war can be carried on only between a nation on one side and private individuals on the other. There is no fourth kind: Grot., *ut supra*.

The right of one nation, or any of its citizens, to invade another, or enter it and do any harm to its property or citizens, does not arise till public war be lawfully denounced in some form. It does not arise where one nation has a quarrel with private persons being within the territory of another. Whether there be any exception to this rule, I shall hereafter inquire.

Much was said in argument, on the assumption that the state of hostilities on the frontier amounted to unsolemn war. In supposing this to be so, counsel come back to the very error which they repudiated in more general terms. A war is none

the less public or national, because it is unsolemn. All national wars are of two kinds, and two only; war by public declaration, or war denounced without such declaration. The first is called solemn or perfect war, because it is general, extending to all the inhabitants of both nations. In its legal consequences it sanctions indiscriminate hostility on both sides, whether by way of invasion or defense. The second is called unsolemn or imperfect war, simply because it is not made upon general, but special declaration. The ordinary instance is a commission of reprisal, limiting the action of the nation plaintiff to particular objects and purposes against the nation defendant. It supposes a partial grievance, which can be redressed by a corresponding remedy or action; and does not authorize hostility beyond the scope of the special authority conferred. Such are several of the instances I have just now mentioned. But they are no less instances of public war. The attack on Copenhagen was mentioned on the argument as an instance of unsolemn war. So indeed it was. The British admiral had a deputation from the war-making power of England to act against the war-making power of Denmark; to demand the surrender of the Danish fleet, and, on refusal, to destroy public or private property, or take life, not as a punishment of private offenders, but to coerce the nation. Why was the attack made? Because Denmark would not surrender her navy voluntarily; and there was danger that France would take it, either by force or under collusion on the side of Denmark. Those who were in arms on the side of Denmark, acted not in their own right, but as agents of the nation to which they were subject. Before the remotest analogy can be seen between that case and the one at bar, the United States must be brought in and made defendant in their corporate capacity. It will be seen, I trust, by this time, that the instance derogates not in the least from the distinction that runs through all the writers on international law, viz., that to constitute either solemn or unsolemn war, the authority to act must emanate from the war-making power on one side, and be intended to influence that power on the other. Action under such a power is necessarily a collision between two nations; and answers to Grotius' definition, viz.: "That is a public war which is made on each side by the authority of the civil power:" B. 1, c. 3, sec. 1. At section four, he divides this sort of war into solemn and unsolemn, of which latter he gives an instance in b. 3, ch. 2, sec. 2, n. 3. *Vide* also Ruth., b. 2, c. 9, sec. 9, 10. The distinction has been followed to this day, though the legal character

of unsolemn war has since been changed. "Both," says Rutherford, "are now lawful. The only real effect of a declaration of war is, that it makes the war a general one; whilst the imperfect sorts of war, such as reprisals, or acts of hostility, are partial, or are confined to particular persons, or things, or places. In a solemn war, all the members of one nation act against the other under a general commission; whereas in public wars which are not solemn, those members of one nation who act against the other, act under particular commissions:" Ruth., b. 2, c. 9, sec. 18; Vat., b. 3, c. 15. And see this distinction well treated: 1 Hal. P. C. 162, 163.

Both sorts of war are lawful, because carried on under the authority of a power having, by the law of nations, a right to institute them. In any other war no belligerent rights can be acquired. All captures, all destruction of property, must be illegal; and the taking of life a crime. Short of this, war can not be carried into an enemy's country, for the simple reason that there is no war to carry there, and no enemy against whom it can be exerted. The nation denouncing war must be explicit. "This makes it," says Vattel, "formal, and so lawful." "But nothing of this kind," says he, "is the case in informal, illegitimate war, which is more properly called depredation. A nation attacked by enemies, without the sanction of a public war, is not under any obligation to observe towards them the rules of formal warfare. She may treat them as robbers:" Vat., b. 3, c. 4, sec. 68. "Such unauthorized volunteers in violence," says Blackstone, "are not ranked among open enemies; but are treated like pirates and robbers:" 3 Bl. Com. 267.

It was accordingly conceded, in argument, that the Canadian provincial authorities had no inherent power to institute a public war: *Vide* Ruth., b. 2, c. 9, sec. 9. We were, however, referred to Burlamaqui, pt. 4, c. 3, secs. 18, 19, to show that those authorities might do so on the presumption that their sovereign would approve the step; and that such approbation would reflect back, and render the war lawful from the beginning. On the assumption that this indirect mode of instituting war had actually been resorted to, counsel again bring themselves back to the fundamental error which led to this application. No one would deny that, if the affair in question can be tortured into war between this nation and England, the United States might take possession of McLeod as a prisoner of war. In such a case, there would have been no need of this motion. But admitting the rule of Burlamaqui, and that coun-

sel might, by the aid of England, get up an *ex post facto* war for the benefit of McLeod, this can not be done by an *equivoque*; and especially not in contradiction to the language of England herself. Neither the provincial authorities nor the sovereign power of either country have, to this day, characterized the transaction as a public war, actual or constructive. They never thought of its being one or the other. Both have spoken of it as a transaction public on one side, to be sure; but both claimed to hold fast the relations of peace. Counsel seem to have taken it for granted that a nation can do no public forcible wrong without its being at war, even though it deny all action as a belligerent. At this rate, every illegal order to search a ship, or enter on a disputed territory, or for the recaption of national property even from an individual, if either be done *vi et armis* and work wrong to another nation or any of its subjects, would be public war; necessarily so, though the actor should deny all purpose of war. Were such a rule once admitted, England and the United States can scarcely be said to have been at peace since the revolution which made them two nations. My endeavor has been to show that on the question of war or peace there is a *quo animo* of nations, by which we are bound.

To prevent all misunderstanding in the progress of the argument, it is proper to observe farther, that an act of jurisdiction exerted by inferior magistrates, civil or military, for the arrest or punishment of individuals. is not public war of either kind. So long as the act is kept within legal compass, though its exertion be violent, where, for instance, the object is to suppress a riot, quell an insurrection, or repel the hostile incursions of individuals, it is, though sustained by a soldiery in arms, only one mode of enforcing the criminal law. It is like calling out the militia as a *posse comitatus* to aid a sheriff who is resisted in the execution of process. Force becomes lawful where the laws are set at defiance. We see this in the frequent resort to soldiers of the regular army by the English, in cases of dangerous riots: *Vide* Ruth., b. 2, c. 9, sec. 9. Such a state of things, therefore, confers no right to act offensively against individuals who reside or sojourn in the neighboring territory. Should they be pursued and arrested, or killed, the act would be a naked usurpation of authority; like the sheriff of one county going into another to execute process. "If," says Rutherford, b. 2, c. 9, sec. 9, "the magistrate, in any instance, use even the force with which he is intrusted, in any other manner or for any other purpose than is warranted by his appointment, this,

as it is his own act, and not the act of the public, can not be called public war."

Sensible that all pretense of belligerent right was wanting, it was therefore, in the first view—as a lawful act of magistracy—that the case was sought to be put by Mr. Fox, both in his letter to Mr. Forsyth and Mr. Webster. I take the words of his last letter, written after the question had been deliberately considered by his government: "The grounds upon which the British government make this demand [the surrender of McLeod] are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her majesty's colonial authority to take any steps and do any acts which might be necessary for the defense of her majesty's territories and for the protection of her majesty's subjects: and that consequently, those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they can not be made personally and individually answerable to the laws and tribunals of any foreign country." In the same letter he restates the opinion of his government, that "it was a justifiable employment of force for the purpose of defending the British territory from the unprovoked attack of a band of British rebels and American pirates."

If this view of the transaction can be sustained, it was lawful *ab initio*. It required no royal recognition to render it national. It came within the power which the Canadian authorities held from England to act in her place and stead. So long as they confined themselves within the territorial line of Canada they were doing no more than the nature of their connection with England required; sustaining that absolute and exclusive jurisdiction to which she is entitled in common with every other nation. Whether they had power, without pretense of being engaged in a war with the United States, or could derive power from England, to fit out an expedition, cross the line, and seize or destroy the property and persons of our citizens in this country, and whether any one acting under such an assumption of power can be protected, is quite a different question.

One decisive test would be furnished by admitting that Durfee had committed a crime against England, for which he was liable to arrest and trial in Canada. None would pretend that any warrant from the English nation could be used to protect one of her officers from an action of false imprisonment, if he had merely arrested the offender on this side the line. No one would pre-

tend that a military order and the addition of the queen's soldiers and sailors would, in such case, strengthen a plea of justification; nor, would the subsequent approval of the nation. This would have no greater effect than the original authority. Accordingly it was not pretended on the argument, that England had any right whatever to send and arrest Durfee as a fugitive from justice. The pretense that she had any such right would have been too absurd to bear the name of argument. Nor is it pretended that her magistrates, civil or military, had any power within our territory to seize and bind him over to keep the peace towards England or her subjects. "We can not," says Vattel, b. 2, c. 7, sec. 93, "enter the territory of a nation in pursuit of a criminal, and take him from thence. This is what is called a violation of territory; and there is nothing more generally acknowledged as an injury that ought to be repelled by every state that would not suffer itself to be oppressed." The rule is too familiar, even as between the states of this confederacy, to require that it should be insisted on at large.

But the civil war which England was prosecuting against various individuals was insisted on as a ground of protection: and I am free to admit, that the strongest possible color for the extraordinary right claimed is to be derived from taking the United States to stand in the attitude of a neutral nation with respect to two parties engaged in actual war; England on one side, and Van Ransselaer, Durfee, and their associated assailants, on the other. This is what Grotius calls mixed war; being, as he says, "that which is made on one side by public authority, and on the other by mere private persons:" B. 1, c. 3, sec. 1. Rutherford retains the same distinction under the same name, in characterizing a contest between a nation, as such, and its external enemies coming in the form of pirates, or robbers; associates, he says, who act together occasionally, and are not united into civil society: Ruth., b. 2, c. 9, sec. 9. The several invasions of England by Perkin Warbeck and Lord Herise mentioned in 1 Hal. P. C. 164, the former of which is also noticed in *Calvin's case*, 7 Co. 11, 12, are instances of such a war; the books saying that, in England, such offenders must be tried by martial law, for a reason which I shall hereafter consider. Let Durfee, then, be regarded as England's enemy, who has, with Wells, the boat-owner, and his boat, taken shelter in the neutral territory of the United States. Had England any right to follow him there? None, say the books, not even in the heat of contest, had he been an enemy pursued and flying for shelter across the

line: 1 Kent's Com. 119, 120. Independently of fresh pursuit, no writer on the law of nations ever ventured the assertion that one of two belligerents can lawfully do any hostile act against another upon neutral ground. If it be not a plain deduction from common sense, yet, on principles in which publicists universally agree, all rightful power to harm the person or property of any one, dropped from the hands of McLeod and his associates the moment they entered a country with which their sovereign was at peace. No exception can be made consistently with national safety. Make it in favor of the subordinate civil authorities of a neighboring state, and your territory is open to its constables; in favor of their military, you let in its soldiery; in favor of its sovereign, and you are a slave. Allow him to talk of the acts and machinations of our citizens, and send over his soldiers on the principle of protection, to burn the property or take the lives of the supposed offenders, and you give up, to the midnight assault of exasperated strangers, the dwelling and life of every inhabitant on the frontier whom they may suspect of a disposition to aid their enemies. Never, since the treaty of 1783, had England, in time of peace with us, any more right to attack an enemy at Schlosser, than would the French have at London, in time of peace with England.

"The full domain," says Vattel, "is necessarily a peculiar and exclusive right. The general domain of a nation is full and absolute; since there exists no authority upon earth by which it can be limited; it therefore excludes all right on the part of foreigners:" B. 2, c. 7, sec. 79. The same writer defines the jurisdiction of courts within that domain. "The sovereignty united to the domain, establishes the jurisdiction of the nation in her territories. It is her province, to exercise justice in all the places under her jurisdiction; to take cognizance of the crimes committed, and the differences that arise in the country:" Id., sec. 84. "It is unlawful," says the same writer, "to attack an enemy in a neutral country, or to commit in it any other act of hostility:" B. 3, c. 7, sec. 132. "A mere claim of territory," says Sir William Scott, a British judge of admiralty, "is undoubtedly very high. When the fact is established, it overrules every other consideration:" *The Vrow Anna Catharina*, 5 Rob. Adm. 15. And he refused to recognize a right of capturing an enemy's ship within a marine league of our coast: *The Anna La Porte*, Id. 332. "We only exercise the rights of war in our own territory," says Bynkershoek, "or in the enemy's, or in a territory which belongs to no one:" Quest.

Jur. Pub., b. 1, c. 8. "There is no exception," says Chancellor Kent, to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful:" 1 Kent's Com. 119, 4th ed. "The jurisdiction of courts," says Marshall, C. J., "is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself: any restriction derived from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction:" *The Schooner Exchange v. McFadden et al.*, 7 Cranch. 116, 136. That these are not rules of yesterday, but have formed a part of the acknowledged law of nations for nearly two thousand years, may be seen in Grotius, b. 3, c. 4, sec. 8, n. 2. He says, we may not kill or hurt an enemy in a country at peace with us. "And this proceeds, not from any privilege attached to their persons, but from the right of that prince in whose dominions they are. For all civil societies may ordain that no violence be offered to any one in their territories but by a proceeding in a judicial way, as we have proved out of Euripides:

'If you can charge these guests with an offense,
Do it by law, forbear all violence.'

But in courts of justice, the merit of the person is considered, and this promiscuous purpose of hurting each other ceases. Livy relates, that seven Carthaginian galleys rode in a port belonging to Syphax, who, at that time, was at peace both with the Carthaginians and Romans; and that Scipio came that way with two galleys. These might have been seized by the Carthaginians before they had entered the port, but being forced by a strong wind into the harbor, before the Carthaginians could weigh anchor, they durst not assault them in the king's haven." Several more modern instances of a like character are stated by Molloy: De Jur. Mar., b. 1, c. 1, sec. 16. It is said to be a rule in the modern law of nations, that not only must the parties refrain from hostilities while in a neutral port; but should one set sail the other must not, till twenty-four hours after: Martens' L. of Nations, b. 8, c. 6, sec. 6, note. And a doctrine about as strong was laid down by Sir William Scott, in the case of the *Twee Gebroeders*, 3 Rob. Adm. 162.

To apply these authorities: The affidavit of McLeod suggests that Durfee had, on the day before he was killed, aided in trans-

porting military stores to Navy island, and surmises that he intended to continue the practice. I put it again that the war, if any, was by England against him and his associates—not against the United States. But what right, I again ask, had she to pursue him into a territory at peace? That she had none, I have shown from her own judge sitting in the forum of nations, from one of our judges sitting in the like forum, from authoritative publicists, and from all antiquity. I have shown that even punic faith felt itself bound to let any enemy go free, whom it accidentally met on neutral ground. Within the territory of a nation at peace, all belligerent power, all belligerent right, is paralyzed. They have passed from the dominion of arms to that of law. “No violence can be offered,” says Grotius; “but you must proceed in a judicial way.” The only offense against our law which Durfee had committed, was in setting on foot a hostile expedition against England with whom we were at peace. So far I admit he was guilty, according to the suggestion in McLeod’s affidavit. He had made himself a principal in the aggression of McKenzie and others; for there are no accessories in misdemeanor. The courts were open. Why did not England prefer her complaint? Was it competent for her to allege that our justice was too mild or too tardy, and therefore substitute the firebrand and musket? To admit such a right of interference on any ground or in any way, says Marshall, would be a proportional diminution of our own sovereignty, of which judicial power makes a part. “The law of nations,” says Rutherford, “is not the only measure of what is right or wrong in the intercourse of nations with each other. Every nation has a right to determine, by positive law, upon what occasions, for what purposes, and in what numbers, foreigners shall be allowed to come within its territories: Ruth., b. 2, c. 9, sec. 6; Vattel, b. 2, c. 7, sec. 94.

It follows from the authorities cited, that a right to carry on mixed war never extends into the territory of a nation at peace. It can be exercised on the high seas only, or in a territory which is vacant and belonging to nobody. It is in modern law confined mainly to the case of pirates. But even these can not be arrested in the territory of a foreign nation at peace with the sovereign of the arresting ship: Molloy de Jur. Mar., b. 1, c. 1, sec. 16. But admitting that England might protect a man against our jurisdiction, by saying he did a public act under her authority, does it not behoove her at least to show that she has acted within the limits of her own jurisdiction, especially where

she has prescribed them to herself? Shall her declaration inure to deprive us of power where she is exceeding her own? And this brings me to inquire whether the transaction in question be such as any national right so far examined can sanction. She puts herself, as we have seen, on the law of defense and necessity; and nothing is better defined nor more familiar in any system of jurisprudence, than the juncture of circumstances which can alone tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury unless prevented by the resistance which he opposes. The rights of self-defense and the defense of others standing in certain relations to the defender, depend on the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to inquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, 3 Bl. Com. 4, that, to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he can not say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of mere defense and prevention; for then the defender would himself become the aggressor." The condition upon which the right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition, or those limits. The Caroline was not in the act of making an assault on the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever they could find her, and were in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants; and their attack might have been legally repelled by Durfee, even to the destruction of their lives. The case made by the affidavit is in principle this: a man believes that his neighbor is preparing to do him a personal injury. He goes half a mile to his house, breaks the door, and kills him in his bed at midnight. On being arraigned, he cites the law of nature; and tells us that he was attacked by his neighbor, and

slew him on the principle of mere defense and prevention; or, in the language of the plea of *son assault demesne*—"he made an assault upon me, and would then and there have beat me, had I not immediately defended myself against him; wherefore I did then and there defend myself as I lawfully might for the cause aforesaid; and, in doing so, did necessarily and unavoidably beat him, doing him on such occasion no unnecessary damage. And if any damage happened, it was occasioned by his assault and my necessary defense."

To excuse homicide in self-defense, says another English writer, the act must not be premeditated. He must first retreat as far as he safely can, to avoid the violence threatened by the party whom he is obliged to kill. The retreat must be with an honest intention to escape; and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of the assault will permit him, and then in his defense, he may kill his adversary: 1 Russ. on Cr. 544.

Such is the law of mixed war on neutral ground. The books cited are treating of no narrow technical rule peculiar to the common law; but the law of nature and of nations, the same everywhere, of such paramount force as no municipal or international law could ever overcome; and intelligible to every living soul. It is easily applied, both as between individuals in civil society and nations at peace. Passing the boundary of strict not fancied necessity, the remedy lies in suit by the state or citizen whose rights have been violated, or by demanding the person of the mischievous fugitive who has broken the criminal law of a foreign sovereign. Accordingly, Puffendorf, after considering the rights of private war in a state of nature, adds: "But we must by no means allow an equal liberty to the members of civil states. For here, if the adversary be a foreigner, we may resist and repel him any way, at the instant when he comes violently upon us: But we can not, without the sovereign's command, either assault him, whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us:" Puf., b. 2, c. 5, sec. 7. The sovereign's command must, as we have seen, in order to warrant such conduct in his subject, be a denunciation of war.

England, then, could legally impart no protection to her subjects concerned in the destruction of the *Caroline*, either as a party to any war, to any act of public jurisdiction exercised by way of defense, or sending her servants into a territory at peace. That her act was one of mere arbitrary usurpation was not de-

nied on the argument, nor has this, that I am aware, been denied by any one except England herself. I should not, therefore, have examined the nature of the transaction to any considerable extent, had it not been necessary to see whether it was of a character belonging to the law of war or peace. I am entirely satisfied it belongs to the latter: that there is nothing in the case except a body of men, without color of authority, bearing muskets and doing the deed of arson and death; that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or to show that it can plausibly claim to come within any law of war, public, private, or mixed. Even the British minister is too just to call it war; the British government do not pretend it was war.

The result is, that the fitting out of the expedition was an unwarrantable act of jurisdiction exercised by the provincial government of Canada over our citizens. The movements of the boat had been watched by the Canadian authorities from the opposite shore. She had been seen to visit Navy island the day before. Those authorities, being convinced of her delinquency, sentenced her to be burned; an act which all concerned knew would seriously endanger the lives of our citizens. The sentence was, therefore, equivalent to a judgment of death; and a body of soldiers were sent to do the office of executioners. Looking at the case independently of British power, no one could hesitate in assigning the proper character to such a transaction. The parties concerned having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man has been killed, it is murder.

This brings us to the great question in the cause. We have seen that a capital offense was committed within our territory in time of peace; and the remaining inquiry is, whether England has placed the offenders above the law and beyond our jurisdiction by adopting and approving such a crime. It is due to her, in the first place, to deny that it has been so adopted and approved. She has approved a public act of legitimate defense only. She can not change the nature of things. She can not turn that into lawful war which was murder in time of peace. She may, in that way, justify the offender as between him and his own government. She can not bind foreign courts of justice by insisting that what in the eye of the whole world was a deliberate and prepared attack, must be protected by the law of self-defense.

In the second place, I deny that she can, in time of peace, send her men into our territory, and render them impervious to our laws, by embodying them and putting arms in their hands. She may declare war: but if she claim the benefit of peace, as both nations have done in this instance, the moment any of her citizens enter our territory, they are as completely obnoxious to punishment by our law, as if they had been born and always resided in this country. I will not, therefore, dispute the construction which counsel put upon the language or the acts of England. To test the law of the transaction, I will concede, that she had by act of parliament conferred all the power which can be contended for in behalf of the Canadian authorities, as far as she could do so; that, reciting the danger from piratical steamboats, she had authorized any colonel of her army or militia, on suspecting that a boat lying in our waters intended illegally to assault the Canadian shore, to send a file of soldiers in the day or night time, burn the boat, and destroy the lives of the crew; that such a statute should be executed; but that one of the soldiers failing to make his escape, should be arrested, and plead the act of parliament. Such an act would operate well, I admit, at Chippewa, and until the men had reached the thread of the Niagara river. It would be an impenetrable shield till they should cross the line of that country where parliament have jurisdiction. Beyond, I need not say, it must be considered as waste paper. Even a subsequent statute ratifying and approving the original authority could add nothing to the protection proffered by the first. It would be but the junction of two nullities. So says Mr. Locke (On Gov., b. 2, c. 19, sec. 239) of a king even in his own dominions: "In whatsoever he has no authority, there he is no king, and may be resisted; for wheresoever the authority ceases, the king ceases too, and becomes like other men who have no authority." I shall not cite books to show that the queen of England has no authority in this state in a time of peace.

I will suppose a stronger case: that England being at war with France, should, by statute or by order of the queen, authorize her soldiery to enter our territory and make war upon such French residents as might be plotting any mischief against her. Could one of her soldiers indicted for the murder of a French citizen plead such a statute or order in bar? If he could not as against a stranger and sojourner in our land, I need not inquire whether the same measure of protection be due to Duffee, our fellow-citizen.

“The laws of no nation,” says Mr. Justice Story, “can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws:” *The Apollon*, 9 Wheat. 362, 371, 372. He has examined the question at large in his book on the Conflict of Laws, c. 2, sec. 17-22, p. 19 of 2d ed. The result is that no nation is bound to respect the laws or executive acts of any foreign government intended to control or protect its citizens while temporarily or permanently out of their own country, until it first declare war. Its citizens are then subject to the laws of war. Till that comes, they are absolutely bound by the laws of peace. While this prevails, a foreign executive declaration saying—“My subject has offended against your criminal laws; I avow his act: punish me; but impute nothing to him”—is a nullity. As well might a nation send a company of soldiers to contract debts here, and forbid them to be sued, saying: “The debt was on my account, discharge my men, and charge it over against me!” Indeed, it was even urged on the argument, that the letter of Mr. Fox had taken away the remedy of Wells, the boat-owner, by an action of trespass against McLeod for burning the boat. This action having, it seems, been settled, counsel resorted to it as an illustrative case. Another action brought against him for shooting a horse on the same occasion, it was said, is also defeated by the same principle. Counsel spoke as if Schlosser had undergone a sack, and its booty had become matter of belligerent right in the soldiery. Surely, the imaginations of counsel must have been heated. It seems necessary to remind them again and again, even in affirmance of their own admission, that we are sitting to administer the laws of a country which was at peace with England when she sent in her soldiery. If they mean that the approval and demand in Mr. Fox’s letter should, under the law of peace, have the sweeping effect which is claimed for it, they are bound to show that the royal mandate improves by importation. The queen has no power at home to take away or suspend, for a moment, the jurisdiction of her own courts. Nor would a command to discharge any man without trial who should be suspected of having murdered her meanest subject, be deemed a venial error. It is justly a source of the Briton’s pride, that the law by which his life and property are protected can not be suspended even by his

monarch; that the sword of justice is holden by her own independent ministers, as a defense for those who do well, but constantly threatening and ready to descend upon the violator of property or personal safety; as the instrument of a municipal law which knows not of any distinction between the throne and the cottage—a law constantly struggling in theory at least, to attain a perfection that shall bring all on earth to do it reverence; “the greatest as fearing its power, and the least as not unworthy of its care.”

Much was said on the argument, about the extreme hardship of treating soldiers as criminals, who, it was insisted, are obliged to obey their sovereign. The rule is the same in respect to the soldier as it is with regard to any other agent who is bound to obey the process or command of his superior. A sheriff is obliged to execute a man who is regularly sentenced to capital execution in this state. But should he execute a man in Canada under such sentence, he would be a murderer. A soldier in time of war between us and England, might be compelled by an order from our government to enter Canada and fight against and kill her soldiers. But should congress pass a statute compelling him to do so on any imaginable exigency, or under any penalty, in time of peace, if he should obey and kill a man, he would be guilty of murder. The mistake is in supposing that a sovereign can compel a man to go into a neighboring country, whether in peace or war, and do a deed of infamy. This is exemplified in the case of spies. A sovereign may solicit and bribe; but he can not command. A thousand commands would not save the neck of a spy, should he be caught in the camp of the enemy: Vattel, b. 3, c. 10, sec. 179. It is a mistake to suppose that a soldier is bound to do any act contrary to the law of nature, at the bidding of his prince: *Id.*, b. 1, c. 4, secs. 53, 54; *Id.*, b. 3, c. 2, sec. 15; Grot., b. 2, c. 26, sec. 3; n. 2 and 3; Puf., b. 8, c. 1, secs. 6, 7. But if he were, he must endure the evil of living under a sovereign, who will issue such commands. It does not follow that neighboring countries must submit to be infested with incendiaries and assassins, because men are obnoxious to punishment in their own country for being desirous to go through life with bloodless hands and a quiet conscience. The Parisians thought themselves bound to obey Charles IX., when he ordered them to massacre the Huguenots. Supposed they had obeyed a similar order to massacre the Huguenots in England: would such an order have been deemed a valid plea, on one of them being arraigned in the

queen's bench? It might have been pleaded to an accusation of murder in France—it would have been good, as between the criminal and his own sovereign; but hardly, I suspect, have been deemed so by Queen Elizabeth's judges. The simple reason would have been that Charles IX. had no jurisdiction in England. He might have threatened the government and declared war, if such a meritorious servant, a defender of the church, should not be liberated by the judges. But there is no legal principle on which the decrees of foreign courts, or the legislation of foreign parliaments, could have ousted the judges of jurisdiction. Charles might have ordered his minister to call the massacre a public act, planned and executed by himself, he having authority to defend and protect his established church; and demand a release of the man. All this would have added no force to the plea. Neither Elizabeth herself, nor any of the Tudors, arbitrary as the government of England was, would have had power directly to take away the jurisdiction of the judges. Coke, with a law book in his hand, could have baffled the scepter within its own territorial jurisdiction. It should, in justice, be remarked, that Orte, the governor of Bayonne, and many of his companions in arms, refused to co-operate in the massacre at home, and were never punished for disobedience. He replied to the king, that he had sounded his garrison, and found many brave soldiers among them, but not a single executioner. Suppose a prince should command a soldier to commit adultery, incest, or perjury; the prince goes beyond his constitutional power, and has no more right to expect obedience than a corporal who should summarily issue his warrant for the execution of a soldier: *Vide Burl. Law of Nature*, vol. 1, pt. 2, c. 11, sec. 8.

Every political and civil power has its legal limits. The autocrat may indeed take the lives of his own subjects, for disobeying the most arbitrary commands; but even his behests can not impart protection to the merest slave as against a foreign government. Public war itself has its jurisdictional limits. Even that, in its pursuit after a flying enemy, is, we have seen, arrested by the line of a country at peace. Beside the limit which territory thus imposes, there are also, even in general war, other jurisdictional restraints, as there are in courts of justice. An order emanating from one of the hostile sovereigns will not justify to the other every kind of perfidy. The case of spies has been already mentioned. An emissary sent into a camp with orders to corrupt the adverse general, or bribe the

soldiery, would stand justified to his immediate sovereign (Vattel, b. 3, c. 10, sec. 180); though even he could not legally punish a refusal. In respect to the enemy, the orders would be an obvious excess of jurisdiction. The emissaries sent by Sir Henry Clinton in 1781 to seduce the soldiers of the Pennsylvania line, falling into the hands of the Americans, were condemned and immediately executed: 4 Marsh. Life of Washington, 366, 1st ed. Entering the adverse camp to receive the treacherous propositions of the general, is an offense much more venial. It is even called lawful, in every sense, as between the sovereign and employee: Vatt., b. 3, c. 10, sec. 181. Yet, in the case of Major André, an order to do so was, as between the two hostile countries, held to be an excess of jurisdiction. These cases are much stronger than any which can be supposed between nations at peace. In time of war, such perfidy is expected. In time of peace, every citizen, while within his own territory, has a double ground for supposing himself secure—the legal inviolability of that territory, and the solemn pledge of the foreign sovereignty.

The distinction, that an act valid as to one may be void as to another, is entirely familiar. A man who orders another to commit a trespass, or approves of a trespass already committed for his benefit, may be bound to protect his servant, while it would take nothing from the liability of the servant to the party injured. As to him, it could merely have the effect of adding another defendant, who might be made jointly or severally liable with the actual wrong-doer. A case in point is mentioned by Vattel (b. 3, c. 2, sec. 15). If one sovereign order his recruiting officer to make enlistments in the dominion of another, in time of peace between them, the officer shall be hanged notwithstanding the order, and war may also be declared against the offending sovereign. *Vide* a like instance, Id., b. 1, c. 6, sec. 75.

What is the utmost legal effect of a foreign sovereign approving of a crime which his subject has committed in a neighboring territory? The approval, as we have already in part seen, can take nothing from the criminality of the principal offender. Whatever obligation his nation may be under to save him harmless, this can be done only on the condition that he confine himself within her territory: Vatt., b. 2, c. 6, sec. 74. Then, by refusing to make satisfaction, to punish, or to deliver him up, on demand, from the injured country, or by approving the offense, the nation, says Vattel, becomes an accomplice: Id., sec. 76. Blackstone says, an accomplice or abettor: 4 Com. 68; and

Rutherford, still more nearly in the language of the English law, an accessory after the fact: B. 2, c. 9, sec. 12. No book supposes that such an act merges the original offense, or renders it imputable to the nation alone. The only exception lies in the case of a crime committed by an ambassador; not because he is guiltless, but by reason of the necessity that he should be privileged, and the extraterritorial character which the law of nations has, therefore, attached to his person. Hence, say the books, he can be proceeded against no otherwise than by a complaint to his own nation, which will make itself a party in his crime if it refuse either to punish him by its authority, or to deliver him up to be punished by the offended nation: Ruth., b. 2, c. 9, sec. 20. Independently of this exception, therefore, Rutherford insists, with entire accuracy, that "as far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us as well as upon him:" Ruth., b. 1, c. 17, sec. 6. A nation is but a moral entity; and, in the nature of things, can no more wipe out the offense of another by adopting it, than could a natural person. And the learned writer just cited accordingly treats both cases as standing on the same principle: B. 2, c. 9, sec. 12. "Nothing is more usual," says Puffendorf, "than that every particular accomplice in a crime be made to suffer all that the law inflicts:" B. 3, c. 1, sec. 5. Vattel says, of such a case (b. 2, c. 6, sec. 75): "If the offended state have the offender in her power, she may without scruple punish him." Again, if he have escaped and returned to his own country, she may apply for justice to his sovereign, who ought, under some circumstances, to deliver him up: Id., sec. 76. Again, he says, "she may take satisfaction for the offense herself, when she meets with the delinquent in her own territories:" B. 4, c. 4, sec. 52. I before cited two instances in which positive orders by his sovereign to commit a crime, are distinctly held to render both the nation and its subject obnoxious to punishment: Vatt., b. 3, c. 2, sec. 15; Id., b. 1, c. 6, sec. 75; *vide* also 1 Burl., pt. 2, c. 11, sec. 10.

Was it ever suggested by any one before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offense? nay, that the coalition of great power, with great crime, does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrator can be reached? Could approbation and avowal have saved the unhappy Mary queen of Scots, where would have been the civil jurisdiction of

Elizabeth's commissioners? The very charge of an attempt by Mary to dethrone and assassinate the British queen, implied the approbation and active concurrence of one crowned head at least. Could the criminal have been saved by any such considerations, the enterprise might truly have been avowed as one which had been planned by the leading governments of Catholic Europe. The pope, then having at least some pretensions to jurisdiction even in England, had openly approved it under his seal. The Spanish ambassador at Paris was a party relied upon to follow up the event with an invasion. Would James, the son of the accused, have hesitated to join in the avowal, could he have thus been instrumental in saving the life of his mother? Yet the principle was not thought of in the whole course of that extraordinary affair. Mary openly avowed her general treason as a measure of defense and protection to herself, though she denied all participation in the plot to assassinate Elizabeth. Yet the only ground taken, was the technical one (not the less valid because technical) that the accused was personally privileged as a monarch and could not be tried under the English law which required a jury composed of her peers. It was added, that she came into the kingdom under the law of nations, and had enjoyed no protection from the English law, having been continually kept as a prisoner: *Vide* the case stated and examined in the light of international law, 2 Ward's L. of Nations, 564. No one pretended that her approbation, or that of a thousand monarchs, could have reflected any degree of exemption from judicial cognizance, upon the alien servants in her employment. Such a principle would have filled England with an army, in time of peace, disguised as Jesuits; for the bigotry of monarchs would, at that day, have led them to avow any system of pernicious espionage which could have served the purposes of the pope by executing his bull of excommunication against Elizabeth.

Canada again being disturbed, and our citizens aiding the revolt by boats, provisions, or money, the purposes of England would certainly require such conduct to be put down at all events. Adopt the principle, that she may by avowal protect her soldiery, who steal upon our citizens at midnight, from all punishment at the common law, and before you could get even a remonstrance from Washington, your whole frontier might be made a *tabula rasa*. No. Before England can lawfully send a single soldier for hostile purposes, she must assume the responsibility of public war.

Her own interests demanding the application of the rule, she perfectly understands its force. What regard have her courts ever paid to the voice of public authority on this side the line, when it sought to cover even territory to which the United States denies her title? The mere act of taking a census in the disputed territory under the authority of Maine, was severely punished by the English municipal magistrates. Had a *posse* of constables or a company of militia bearing muskets been sent to aid the censor, in what book or in what usage could she have found that this would divest her courts of jurisdiction, and put the cabinet of St. James to a remedy by a remonstrance or war? Had the *posse* been arrested by her sheriff, and in mere defense had killed him, and this nation had, after some two or three years, avowed the act, would she have thought of conceding that, in the mean time, all power of her courts over the homicides had been suspended, or finally withdrawn?

But it is said of the case at bar, here is more than a mere approval by the adverse government; that an explanation has been demanded by the secretary of state, and the British ambassador has insisted on McLeod's release; and counsel claim for the joint diplomacy of the United States and England some such effect upon the power of this court as a *certiorari* from us would have upon a county court of general sessions. It was spoken of as incompatible with a judicial proceeding against McLeod in this state; as a suit actually pending between two nations, wherein the action of the general government comes in collision with, and supersedes our own. To such an objection the answer is quite obvious. Diplomacy is not a judicial, but executive function; and the objection would come with the same force, whether it were urged against proceeding in a court of this state or the United States. Whether an actual exertion of the treaty-making power, by the president and senate, or any power delegated to congress by the federal constitution, could work the consequences contended for, we are not called upon to inquire. Whether the executive of the nation (supposing the case to belong to the national court), or the executive of this state, might not pardon the prisoner, or direct a *nolle prosequi* to be entered, are considerations with which we have nothing to do.

The executive power is a constitutional department in this, as in every well-organized government, entirely distinct from the judicial. And that would be so, were the national government blotted out, and the state of New York left to take its place as

an independent nation. Not only are our constitutions entirely explicit in leaving the trial of crimes exclusively in the hands of the judiciary; but neither in the nature of things, nor in sound policy, can it be confided to the executive power. That can never act upon the individual offender; but only by requisition on the foreign government; and in the instance before us, ✓ it has no power even to inquire whether it be true that McLeod ✓ has personally violated the criminal laws of this state. It has charge of the question in its national aspect only. It must rely on accidental information, and may place the whole question on diplomatic considerations. These may be entirely wide either of the fact or the law as it stands between this state and the accused. The whole may turn on questions of national honor, national strength, the comparative value of national intercourse, or even a point of etiquette.

Upon the principle contended for, every accusation which has been drawn in question by the executive power of two nations, can be adjusted by negotiation or war only. The individual accused must go free, no matter to what extent his case may have been misapprehended by either power. No matter how criminal he may have been, if his country, though acting on false representations of the case, may have been led to approve of the transaction and negotiate concerning it, the demands of criminal justice are at an end.

Under circumstances the executive power might, in the exercise of its discretion, be bound to disregard a venial offense as no breach of treaty, which the judiciary would be obliged to punish as a breach of international law. Suppose some of our citizens to attack the British power in Canada, and the queen's soldiers to follow the heat of repelling them by crossing the line and arresting the offenders, doing no damage to any one not actually engaged in the conflict. The line being absolutely impassable in law for hostile purposes, the arrest on this side would be a technical false imprisonment, for which we should be bound to convict the soldiers if arrested here; while the executive power might overlook the intrusion as an accidental and innocent violation of national territory: Vatt., b. 4, c. 4, sec. 43.

I forbear now to notice particularly some of the legal passages and cases which were referred to by the prisoner's counsel in the course of the argument; not for the reason that I have omitted to examine them, but because I consider them inapplicable under the views I have felt it my duty to take of the prisoner's

case. They were principally of three classes: first, passages from books on the law of nations as to what is public war, and the protection due to soldiers while engaged in the prosecution of such a war by their sovereign against a public enemy; secondly, the general obligations of obedience as between him and his sovereign, whether in peace or war; and thirdly, cases from our own books relative to the conflicting powers of the general and state governments. The case of *Elphinstone v. Bedreechund*, 1 Knapp, 316, related to the breach of an actual military capitulation entered into during an acknowledged public war between England and one of the petty sovereignties of India.

In considering the question of jurisdiction, I have also forbore to notice that branch of the affidavit which sets up an *alibi*. McLeod's counsel very properly omitted to insist on it as at all strengthening the claim of privilege. Indeed they said the clause was put in merely by way of *protestando*. If it was inserted with the intention of having it taken as true upon this motion, that alone would destroy all pretense for any objection to our jurisdiction. His surrender was demanded upon the hypothesis that he was acting under public authority. If in truth he was not, or was not acting at all, he enjoys according to his own concession no greater privilege than any other man. The essential circumstance relied on as going to the question of jurisdiction, turns out to be fictitious; and the argument must be that we have no power try the question of *alibi*. On that and every other lawful ground of defense he will be heard by counsel on his trial.

It is proper to add that if the matters urged in argument could have any legal effect in favor of the prisoner, I should feel entirely clear that they would be of a nature available before the jury only. And that, according to the settled rules of proceeding on *habeas corpus*, we should have no power even to consider them as a ground for discharging the prisoner. I took occasion to show in the outset that in no view can the evidence for the prosecution or the defense be here examined independently of the question of jurisdiction, and I entertain no doubt that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction.

I know it is said by the English books, that even in a case of mixed war, viz., a hostile invasion of England by private persons, the common law courts have not jurisdiction. It was so

held in *Perkin Warbeck's case*. He was punished with death by sentence of the constable and marshal, who it is said in *Calvin's case*, 7 Co. 11, 12, had exclusive jurisdiction: S. P., 1 Curw. Hawk., c. 2, sec. 6, p. 9. See Dy. 145, a.¹ But that rests on a distribution of judicial power entirely unknown to this state or this nation. The court of the constable and marshal seems to have had an ancient right not very well defined by the common law, of trying all military offenses, as appears by the Stat. R. 2, c. 2, *vide* 2 Pick. St. at Large, p. 310, which was passed to settle conflicting claims of jurisdiction between that and the ordinary courts. *Vide* also 3 Inst. 48. The whole is obviously inapplicable to this country; and I suspect pretty much obsolete in England. It never can have been held in England, or any country, that where a common law court is proceeding on an indictment for a common law offense against one arrested and brought before it, a mere suggestion by affidavit that the offense imputed pertains to deeds of arms, either in a public or mixed war, shall take away power to try whether the prisoner be guilty or not of the charge contained in the indictment.

All homicide is presumed to be malicious, and therefore murder, until the contrary appear upon evidence. "The matter of fact," says Foster, "viz., whether the facts alleged by way of justification, excuse, or alleviation, are true, is the proper and only province of the jury:" Foster, 255. Lawful defense by an individual, still recognized, it seems, by the law of nature under the name of private war, Grot., b. 1, c. 3, sec. 2, is one instance: Foster, 273. That he acted in right of a nation, or under public authority, is no more than matter of justification. It is like the case mentioned in Foster, 265—the public execution of malefactors—and the jury must judge whether the authority may not have been exceeded. But more, when public or mixed war is alleged in mitigation, either allegation may be fictitious; and it should be put to the jury, on the proper evidence, whether it existed or not. The reason is plain, says Lord Hale; for the war may be begun by the foreign prince only, where it is public; and he supposes it still plainer where the war is between the king and an invading alien, being the subject of a nation with whom the king is at peace: 1 Hal. P. C. 163, 164. The same writer puts the case of plunder or robbery by an enemy, *tempus belli*, which would not in general be burglary. Yet he admits it might be otherwise if the act were not done in the regular prosecution of the war: Id. 565.

Suppose a prisoner of war to escape, and that on his way

1. *Sherley's case*.

home, and before he crossed the line, he should set fire to a farm-house in the night and kill the inmates: is there a doubt that he might properly be convicted either of arson or murder? When a grand jury have charged that a man has committed murder within this state, I can imagine no case, whether the charge relate to the time of public war or peace, in which he can claim exemption from trial. If he show that he was in truth acting as a soldier in time of public war, the jury will acquit him. The judge will direct them to obey the law of nations, which is undoubtedly a part of the common law. So if the accused were acting in defense against an individual invader of his country. But above all things, it is important in the latter case for the jury to inquire whether his allegation of defense be not false or colorable. They can not allow as an act of defense, the willful pursuing even such an enemy, though dictated by sovereign authority, into a country at peace with the sovereign of the accused; seeking out that enemy and taking his life. Such a deed can be nothing but an act of vengeance. It can be nothing but a violation of territory, a violation of the municipal law, the faith of treaties, and the law of nations. The government of the accused may approve, diplomacy may gloze, but a jury can only inquire whether he was a party to the deed, or to any act of illegal violence which he knew would probably endanger human life. If satisfied that he was not, as I sincerely hope they may be, upon the evidence in the case before us, they will then have the pleasant duty to perform of pronouncing him not guilty. But whatever may be their conclusion, we feel the utmost confidence that the prisoner, though a foreigner, will have no just cause to complain that he has suffered wrong at the hands of an American jury.

At our hands, the prisoner has a right to require an answer upon the facts presented by his papers, whether in law he can properly be holden to a trial. We have had no choice but to examine and pronounce upon the legal character of those facts, in order to satisfy ourselves of the bearing they might have on the novel and important question submitted. That examination has led to the conclusion that we have no power to discharge the prisoner.

He must, therefore, be remanded, to take his trial in the ordinary forms of law.

Ordered accordingly.

The principal case attracted great attention at and about the time the decision of Judge Cowen was pronounced. The United States and Great Britain

were really the two contesting parties. The latter insisted that the executive department of this government should interpose, and require the judiciary to release McLeod from custody. The former replied, that the executive did not possess the authority to interfere with the judicial department, and to determine in effect that a person held under indictment in due form, found by a legally constituted grand jury, was guilty of no offense punishable under our laws. Upon this question we apprehend that there can be little doubt of the correctness of the position taken by the government of the United States. The guilt or innocence of an accused is essentially a judicial question. This ordinarily would be doubted by no one. In the principal case it was insisted, that even if McLeod had participated in the burning of the *Caroline* and the killing of Durfee, he did so acting under the command of his sovereign, or of her military officers, and was therefore not answerable to the judicial tribunals of the nation in which these acts were done. If this were true, it constituted nothing but matter of evidence showing that under the indictment against him he ought to be acquitted. In response to this evidence it was surely competent to the prosecution to offer other evidence, if such it could produce, to prove that the accused did not act under the directions of any sovereign or other power, but committed the acts from mere wantonness and malice. In this view of the case, Great Britain never coincided, and the conviction of McLeod would doubtless have been followed by an immediate declaration of war against the United States.

The great importance and notoriety of the case tempted Judge Cowen to the consideration of questions which no doubt were fully argued before him, but which were not at all necessary to be determined. Upon these questions he would, perhaps, have acted more wisely had he expressed no opinion, as it was manifest that the prisoner must be held on the other grounds stated by him.

The return of the officer showed an indictment in due form against the prisoner, accusing him of the crime of murder. The court was clearly right in deciding that this was ample authority for retaining the defendant in custody, and that his guilt or innocence must, as in other cases, be submitted to a jury to be determined under the instructions of the trial court. The court, on *habeas corpus*, will not try this question by summoning witnesses before it, nor will it look into the evidence taken before the grand jury: *Matter of Miller*, 1 Daly, 571; *People v. Martin*, 1 Park. C. C. 189; *People v. Ruloff*, 5 Id. 81; *People v. Dixon*, 3 Abb. Pr. 398; 4 Park. C. C. 654; Hurd on Habeas Corpus, 2d ed., p. 436. But it has not been unusual for courts, even after indictment, to hear affidavits and other evidence for the purpose of determining whether the prisoner ought to be admitted to bail: Hurd on Hab. Corp. 435, 437; *State v. Hill*, 1 Const. Rep. 242; *Street v. State*, 43 Miss. 1; *Ex parte Wray*, 30 Id. 681; *Republic v. Wingate*, 3 Brevard, 89; *Lum v. State*, 3 Port. Ind. 393; *Lynde v. People*, 38 Ill. 497; *State v. McNab*, 20 N. H. 160; *Commonwealth v. Rutherford*, 5 Rand. 646; *Drury v. State*, 25 Tex. 45; *Ex parte Bryant*, 34 Ala. 270; *People v. Hyler*, 2 Park. C. C. 570. But we think the better rule is, that after indictment of defendant, and perhaps after his being committed by an examining magistrate, the court will, on *habeas corpus*, regard him as guilty of the offense with which he is charged, and will not, even on an application to admit him to bail or to reduce the amount of his bail, examine the evidence for the purpose of determining whether he is probably innocent, and ought therefore to be admitted to bail or have the amount of his bail reduced, unless perhaps in very extreme and peculiar circumstances: *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Id. 410; *Territory v. Benoit*, 1 Mart. La. 142; *State v. Mills*, 3

Dev. 421; *Hight v. United States*, 4 Morris, 4; 1 *Burr's Trial*, 310; *United States v. Ruse*, 3 Wash. C. C. 224; *People v. Tinder*, 19 Cal. 539; *Ex parte Spradlend*, 38 Mo. 547.

The conclusions of Judge Cowen respecting the effect of the statute of New York regarding *habeas corpus* has met with the approval of the courts in subsequent cases. The statute does not confer upon the courts any new or additional power to inquire into the facts upon which the process under which the prisoner is held was founded: *Bennac v. People*, 4 Barb. 33. The court may, however, always inquire whether the court issuing its process or warrant had jurisdiction: *People v. Rawson*, 61 Barb. 625; *Matter of Divine*, 21 How. Pr. 82; 5 Park. C. C. 65; also whether the process is legal and sufficient on its face, and whether any fact occurring since its issue has terminated its effect, as lapse of time, reversal of judgment, or granting of a pardon: *People v. Cassels*, 5 Hill, 168; *Greathouse's case*, 2 Abb. U. S. 385; *In re Edymoin*, 8 How. Pr. 481. Mere formal defects in the process have been held insufficient to warrant the discharge of the prisoner: *Wiles v. Brown*, 3 Barb. 89. Where the prisoner is shown to be held in pursuance of a commitment issued after an examination before a committing magistrate, or after an inquest before a coroner, the court may look into the depositions to see whether the facts there shown justified the holding of the prisoner to answer, or whether such facts will not warrant the admission of the prisoner to bail: *People v. Van Horne*, 8 Barb. 163; *People v. Thompson*, 1 Park. C. C. 235; *People v. Beigler*, 3 Id. 322.

NOLLE PROSEQUI can not be entered on the motion of the court alone. Its entry requires the concurrence of the court and the prosecuting officer. It must be by leave of the former granted upon the application of the latter: *Thomason v. Demotte*, 9 Abb. Pr. 243; 18 How. Pr. 529.

Mr. Justice Cowen was, we think, clearly right in remanding McLeod for trial. It was not necessary, and scarcely proper for him, in *habeas corpus*, to undertake to determine the principles of law which ought to prevail at the trial. His remarks concerning the extent to which McLeod should be protected by the rules of international law, were mere *dicta*, and have, so far as we are aware, never been mentioned, except to be disapproved.

The acts of which McLeod was accused were done under the direction and by the authority of an officer of Great Britain, and they were afterwards assumed, approved, and ratified by the sovereign power of that nation. The opinion of Mr. Webster, the American secretary of state, was that after such approval the "individuals concerned ought not, by the principles of public law, and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it." In this view the most eminent American jurists seem very generally to concur: Halleck's *International Law*, c. 14, secs. 21-23; 1 Op. Att'y-Gen. U. S. 81; *Carrington v. Ins. Co.*, 8 Pet. 522; Tallmadge's review, 26 Wend. 674; 4 Law Reporter, 169, published at Boston, September, 1841; Bishop on Criminal Law, sec. 132.

To prevent any further conflict between the state and national authorities on this subject, a statute was passed in 1842 (5 U. S. St., p. 539) providing "that either of the justices of the supreme court of the United States, or judge of any district court of the United States, in which a prisoner is confined, * * shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States or any one of them, for or on account

of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof," and the act provides for the discharge of such prisoner from custody if "it appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody, or arrest, for or by reason of such alleged right, title, authority, privilege, protection, or exemption, so set up and claimed, and the laws of nations applicable thereto."

"Among European writers on public law, there seems to be a very general unanimity of opinion. Vattel says that 'on all occasions susceptible of doubt, the whole nation, the individual, and especially the military, are to submit their judgment to those who hold the reins of government.' The sovereign alone is to be held guilty for the acts of unlawful war; he alone is bound to repair the injuries, and not those who act under his authority. 'The subjects, and in particular the military, are innocent; they have acted only from a necessary obedience.' Rutherford says that even in an imperfect sort of war, 'what the members do, who act under the particular direction and authority of their nation, is, by the law of nations, no personal crime in them; they can not, therefore, be punished consistently with this law, for any act in which it considers them only as the instruments and the nation as the agent.' Burlamaqui says that the mere presumption of the will of the sovereign will not be sufficient to excuse a governor, or any other officer, for committing acts of war. But if the sovereign ratify such acts, this approbation reflects back the authority of the sovereign upon the acts, and so obliges the whole commonwealth:" Halleck's Int. Law, c. 14, sec. 24.

Mr. Halleck further says in sec. 31, c. 16: "It has already been shown, in speaking of seizures and reprisals, that the hostile acts of individuals, when ratified and assumed by their government, are to be regarded as the hostile acts of the state. These acts may be of the character of reprisals or of mixed or imperfect war, or of a virtual declaration and commencement of solemn war. Such acts, however, must not exceed what the laws of war have established as belligerent rights of the subjects of hostile states. For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war, not authorized or assumed by his government, as the act of the state. The distinction between the two cases is manifest, and should never be lost sight of: the latter is punishable by the rules of civil law, while the former is an offense against the laws of nations, punishable only by the laws and usages of war. The taking of property, and of human life, in the one case would be robbery and murder, punishable under the local laws; while in the other case the same acts might be fully justifiable as the lawful exercise of belligerent rights under the laws of nations."

STAFFORD v. BACON.

[1 HILL, 532.]

ACCORD AND SATISFACTION procured by the debtor's willfully misrepresenting or suppressing any material fact in the statement of his affairs, are void; and even a sealed release based thereon will be set aside in equity. ORIGINAL DEBT IS DISCHARGED if the debtor effects a compromise, and gives the note of a third person in payment of the sum fixed by the compromise.

MORAL OBLIGATION TO PAY THE RESIDUE OF A DEBT DISCHARGED BY ACCORD AND SATISFACTION does not exist, and, therefore, a promise to pay such residue can not be enforced by action; such obligation exists when a debt is discharged by the provision of some positive law, and not by the act of the parties.

PROMISE TO PAY A DEBT DISCHARGED BY BANKRUPTCY and the like, must be specially pleaded.

COMMUNICATION TO A STRANGER OF AN INTENT TO PAY A DEBT which has been discharged, is not available to the creditor as a promise to pay him such debt.

ASSUMPSIT. Plea, *non assumpsit*, and accord and satisfaction. It appeared that on May 26, 1829, a debt existed in favor of plaintiff of two thousand four hundred and seventy-nine dollars and nineteen cents, for goods sold and delivered; that defendant represented himself as unable to pay over six shillings and eight pence to the pound; that a compromise was accordingly effected for that sum, and the note of H. Horton & Co. was given and received in payment. There was evidence tending to prove that the compromise was procured by misrepresentations made by defendant respecting his affairs; and that after it was made defendant had a conversation with Job Stafford, a son of plaintiff, who had been plaintiff's clerk in 1825; that defendant in such conversation told Job, that plaintiff had acted handsomely, and that he would pay plaintiff the balance when he was able. Evidence of plaintiff's ability to pay at and before the commencement of this action was given. A motion for nonsuit was made, on the grounds stated in the opinion; but it was denied. The jury was instructed that if the compromise was obtained by fraud, or if the defendant promised to pay the balance when able, and his ability to pay had been shown, then the verdict ought to be for plaintiff. The jury found for plaintiff. Defendant moved for a new trial.

A. Taber, for the motion.

J. Lansing and M. T. Reynolds, contra.

By Court, COWEN, J. No dispute exists on the original account. The question of fraud in procuring the compromise was properly submitted to the jury; and were this the only point, their finding would not be disturbed. The duty of a debtor who comes for a discharge on part payment, is clear. If he willfully misrepresent or suppress any material fact in the statement of his affairs, the accord and satisfaction are void; and even a sealed release would be set aside in equity. The cases on this point are cited in *Carter v. Connell*, 1 Whart. 392,

and the rule well expressed by Sergeant, J., at p. 397. But, fraud out of the way, there is no doubt the original debt was discharged by the compromise and payment of six shillings and eight pence on the pound. The note of H. Horton & Co. was received expressly in satisfaction. The answer set up by the plaintiff was, that the defendant had subsequently promised to pay when he was able. This is resisted: 1. On the ground that the special promise was neither declared on nor replied; and 2. That it was void for want of consideration.

The only ground on which the plaintiff could make the promise available, was the moral obligation to pay a debt clearly extinguished; and the point of pleading was entirely settled by this court in *Depuy v. Swart*, 3 Wend. 135 [20 Am. Dec. 673]. There the defendant had been discharged under the two-third insolvent act. The plaintiff sued on a negotiable note given previously to the discharge, alleging also a new and absolute promise to the payee, who sold the note to the plaintiff. This court held that it was discharged; that the subsequent promise made a new contract on which the payee must declare specially or reply the new promise. The same thing was repeated in *Moore v. Viele*, 4 Wend. 420, and *Wait v. Morris*, 6 Id. 394. *A fortiori*, where the promise is conditional. *Penn v. Bennett*, 4 Camp. 205, is also in point. The plaintiff declared for goods sold, etc.; defense, a certificate under the bankrupt act; answer, a new promise. Lord Ellenborough told the jury expressly, that if they thought the new promise was conditional, the plaintiff could not recover, because he had not declared specially. *Wait v. Morris* was the case of a conditional promise, after an insolvent discharge. The plaintiff replied a subsequent ratification of the promises declared on, but omitted to state the condition; nor indeed, perhaps, was even an absolute promise replied in due form. This court held a replication at least essential; and granted a new trial with leave to amend. I need not stop to show that an accord and satisfaction is a still stronger case for the defendant. It is a conventional discharge, the same as a release or actual payment of the whole. In the case at bar the point was distinctly made, that evidence of the subsequent promise was inadmissible under the pleadings. And yet the charge was, that a promise to pay on becoming able, and actual ability, would entitle the plaintiff to a verdict. Nearly the same point had been previously made on the motion to nonsuit.

The abstract question, whether moral obligation be predicable

of a debt discharged by accord and satisfaction, does not seem to have been raised very distinctly at the trial. The point on the motion for a nonsuit was: "There is no evidence for which the defendant ought to be put upon his defense on the ground of a subsequent promise." And again, after the close of the evidence—"the conversation sworn to by Job Stafford, was not in law a valid or binding contract or promise." Job Stafford appears to be the only witness who spoke to the promise. A motion was also made in the course of the trial to strike out that part of his testimony. The particular ground, viz., that the debt had been discharged, was not mentioned; and the alleged promise is now assailed for three reasons besides that, viz., 1. As varying the terms of the written compromise; 2. As being *nudum pactum*; 3. As not made either to the plaintiff or his agent. Strictly, all these grounds should have been mentioned at the trial. They would then have been distinctly seen, perhaps allowed, and the plaintiff's counsel or the judge being made aware of the defects, farther evidence might have been given on that or on other branches of the case. All the four points now made are, however, included in the general objection; and, as I am of opinion that there must be a new trial on another ground, and the points were discussed on the argument, it may be useful to examine and dispose of them.

The first objection is obviously without any foundation in fact. The promise, so far from varying the terms of the written compromise, assumed its existence, and stipulated to pay the balance. The second—that the promise was *nudum pactum*—is nearly identical with the objection that no moral obligation remained. That it was made neither to the plaintiff nor his agent is, I think, a fatal objection. A mere casual expression of intention to pay, made to a stranger after a man has been discharged, as an insolvent for instance, would clearly be unavailable in favor of the creditor: *Moore v. Viele*, 4 Wend. 420, 422. In this case, it is said, if made to a third person it may be good. There is no doubt of that; for it may be intended that it should be reported to the creditor; and he might, in such case, adopt the act of the stranger in receiving it, thus making him his agent. It is insisted that Job Stafford was clerk to the plaintiff, and in that sense his agent. But I can not find proof that he was so when the promise was made, though there is evidence that he had been before, in 1825. Several years, however, had elapsed between that time and the period of the promise. His being a son of the plaintiff was, it may be, a circumstance with the jury

that the defendant intended his promise for the plaintiff, who, therefore, had a right to adopt it. The promise was for his benefit; and he bringing his action upon it may, perhaps, by this act, have connected himself with it. Should the objection be made on the new trial, there is by no means an impossibility that it may be answered. But the law has stood ever since *Weeks v. Tybald*, Noy, 11, that the communication of an intent to pay, made to a mere stranger, and not connected with the plaintiff by any matter before or after, is void: *Vide Cole v. Cottingham*, 8 Car. & P. 75.

Whether after the debt was discharged by an accord and satisfaction, there remained any moral obligation to pay the balance, will perhaps form the decisive question, at least in one branch of the cause. I think there did not. The strongest case for the plaintiff is that of an insolvent discharge under the two-third act, on the petition of the plaintiff. There it is held, enough remains to sustain a new promise: *McNair v. Gilbert*, 3 Wend. 344. But this is a discharge by provision of positive law. Chitty says that "in all the cases in which a moral obligation has been deemed a sufficient consideration for the defendant's express promise, etc., nothing but the provision of some positive law had interposed to preclude a legal remedy, etc., until the defendant expressly promised:" Chit. on Con. 12, 13, Phil. ed. of 1834. It is not necessary to go over the cases. Many are collected in a note to *Edwards v. Davis*, 16 Johns. 283, 284, in support of the proposition thus limited; and it had been before the publication of 16 Johns. adopted in substance by Spencer, J., in *Smith v. Ware*, 13 Johns. 257, 259. The propriety, indeed the necessity of such a limitation, is shown by Daggett, J., in *Cook v. Bradley*, 7 Conn. 57 [18 Am. Dec. 79]; and he also contends, on a very full consideration of the cases down to 1828, that we are bound to it by legal authority: *Vide* also *Mills v. Wyman*, 3 Pick. 207, and *Eastwood v. Kenyon*, 3 Perry & Dav. 276.

In the case at bar, the plaintiff had accepted the commercial paper of a third person, expressly in satisfaction; and there seems also to have been a general compromise with creditors, in which he participated. He himself had virtually promised the defendant and the other creditors to consider the debt discharged. The moral obligation lies much on his side. I speak not of the alleged fraud in obtaining the receipt. If that exist, no doubt the defendant is liable; and had that alone been put to the jury, I could have felt no difficulty. There were circumstances of

suspicion which called for explanation. But looking at the form in which the case was put to the jury, they may have based themselves entirely on the promise and supposed moral obligation of the defendant. The case is the same in legal effect as if the debt had been released under seal, or paid in full.

When a debtor is voluntarily and fairly discharged by his creditors, it must be left to his option whether he will pay. Being an honest man and becoming able, payment would be a thing of course; but that is a matter of mere imperfect obligation which the law can not act upon without going wide of its office, and, indeed, dismissing the rule which calls for a valuable consideration in any case. In one sense, a man is always under a moral obligation to fulfill a fair promise whether made on a consideration or not; for instance, a promise of charity to a stranger. It would follow from the proposition in question as it is sometimes put, that, in the case supposed, a second promise might be sued upon, and the charity enforced by execution.

I am aware that the conclusion to which I have arrived is opposed by the decision in *Willing v. Peters*, 12 Serg. & R. 177, decided in 1824. That case was the same as the one before us. The court held the promise binding, and likened it to a promise by an insolvent discharged under the two-third act. That case, however, was questioned in the very court which decided it, and I think overturned, by the late case of *Snevily v. Reed*, 9 Watts, 396, 401, A. D. 1840. The plaintiff had discharged the body of the defendant from custody under a *ca. sa.*, and he afterwards promised to pay the debt. Held, that no moral obligation remained, sufficient to sustain the promise.

My opinion is, that a new trial should be granted, the costs to abide the event.

New trial ordered.

A MORAL OBLIGATION WILL BE A SUFFICIENT CONSIDERATION for a promise if it is the result of a precedent legal obligation which has ceased to be enforceable because of the interposition of some rule of law. Thus, if payments have been made on a debt, on which judgment has nevertheless afterwards been obtained in full, because of the default of defendant, a promise on the part of the judgment creditor to apply the payments on the original debt, in discharge of the judgment, will be supported: *Cameron v. Fowler*, 5 Hill, 309; but if the obligation is discharged, as by an accord and satisfaction, there is no moral obligation remaining sufficient to constitute a consideration: *Platts v. Walrath*, H. & D. 61. Further as to what will be a sufficient consideration, see *Van Der Veer v. Wright*, 6 Barb. 551, citing the principal case. See, also, *Cook v. Brudley*, 18 Am. Dec. 79.

AN ACCORD AND SATISFACTION obtained through fraudulent misrepresentation of the debtor in regard to the state of his affairs is void: *Dolsen v. Arnold*,

10 How. Pr. 531, citing the principal case. To the same point see *Reynolds v. French*, 30 Am. Dec. 456.

A PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY must, in New York, be declared upon, as it is the substantive cause of action, and the old debt merely the consideration: *Dusenberry v. Hoyt*, 14 Abb. N. S. 134; 45 How. 148; 36 N. Y. Supr. Ct. 97. A distinction has been taken in that state between this case and that of a promise to pay a debt barred by the statute of limitations. The distinction is based upon the promise that notwithstanding the bar of the last named statute the original legal obligation exists, and that the reason it can not be enforced is because of the presumption of payment raised by the statute from the lapse of time. It follows of course from this premise, that the new promise or acknowledgment, which is but evidence to avoid the presumption and the defense arising from it, need not be pleaded: *Watkins v. Stevens*, 4 Barb. 174; *Reid v. McNaughton*, 15 Id. 183; *Philips v. Peters*, 21 Id. 358. The objections to the distinction are very evident.

A PROMISE MADE TO A STRANGER can not be availed of: *Grinnell v. Cook*, 3 Hill, 488; *Wakeman v. Sherman*, 9 N. Y. 93.

WADDELL v. COOK.

[2 HILL, 47.]

OFFICER SELLING THE ENTIRE PROPERTY UNDER EXECUTION against one co-tenant thereof, abuses his legal authority and becomes liable as a trespasser *ab initio*, although in making the levy he was authorized to take exclusive possession of the property.

TRESPASS against a marshal for seizing and selling the goods of Cook under a writ against Bowne, Cook's co-tenant. The marshal, instead of selling Bowne's interest, sold the goods as if they had been owned by Bowne in severalty. Evidence was offered tending to prove Cook's assent to the sale. Defendant asked for an instruction that trespass would not lie. This the court refused, and told the jury that unless Cook consented to the sale, he was entitled to recover for one half of the value of the property. Verdict for the plaintiff. Defendant prosecuted a writ of error.

S. A. Crapo, for the plaintiff in error.

A. Cook, in person.

By Court, COWEN, J. The question was properly submitted to the jury by the court below, on the question of Cook's assent to the sale. There being no consent, we think trespass *de bonis* was properly brought. True, the taking was lawful. The marshal came, by the levy, into the place of Bowne, the co-tenant, thus acquiring and holding the possession. So far,

there can be no just complaint; and it would seem by the case of *Mersereau v. Norton*, 15 Johns. 179, that though the marshal went on and sold the whole property, yet trespass would not lie by Cook against the purchaser. The legal effect of the sale was merely to vest Bowne's share in the purchaser, who thus became a tenant in common with Cook; and so not liable in trespass, unless he destroyed the chattels: *Id.* 179, 181. Chancellor Kent has remarked that a sale of the whole interest by one co-tenant would subject him to either trover or trespass at the suit of his co-tenant: 2 Kent's Com. 350, note b, 4th ed. That trover would lie, we lately held in *White v. Osborn*, 21 Wend. 72; and *vide Barton v. Williams*, 5 Barn. & Ald. 395. It is said that none of the cases cited by Chancellor Kent, except *Mersereau v. Norton*, wherein judgment was against the plaintiff, were actions of trespass; and that seems to be so. I have not, however, examined them very particularly, because I have come to the conclusion that the case at bar depends on considerations other than those which pertain to the mere relation of one tenant in common or joint tenant to another. The latter may take the exclusive possession of the chattel in respect to his common title; and it may be wrong to say that for a mere sale he shall be liable in trespass. But the sheriff (or here the marshal) acts under an authority in law, which, though it extends to a total dispossession of both the co-tenants by an execution against one, yet the same law denies him the right to sell the entire property. In attempting to do so, though the act be nugatory, yet the law may well treat it as such an abuse of legal authority as renders him a trespasser *ab initio*. This is the exact case of *Melville v. Brown*, 15 Mass. 82, which, though it does not appear to have been much considered, yet was distinctly, and we think properly, placed by the court on the principle mentioned.

Judgment affirmed.

UPON EXECUTION AGAINST ONE PARTNER, the sheriff may seize upon and take possession of the partnership property, and may, after a sale of the interest of the judgment debtor therein, deliver possession to the purchaser: *Walsh v. Adams*, 3 Denio, 127. By parity of reason the sheriff is entitled to take into his custody partnership property, by virtue of an attachment against one of the members of the firm: *Goll v. Hinton*, 8 Abb. 122; *Smith v. Orsen*, 42 N. Y. 136; S. C., 43 Barb. 190; *Hergman v. Dettlebach*, 11 How. Pr. 47, citing the principal case. As to what is a proper levy on partnership property, where the satisfaction of the private debt of one of the partners is sought, see *Morrison v. Blodgett*, 29 Am. Dec. 653 and note.

A SHERIFF WHO ATTEMPTS THE SALE OF THE ENTIRE PROPERTY UPON

an execution against one tenant in common therein, or against a partner, is liable in trespass or trover: *Bates v. James*, 3 Duer, 53; *Ryder v. Gilbert*, 16 Hun, 166; *Mabbett v. White*, 12 N. Y. 457, dissenting opinion; *Atkins v. Saxton*, 77 Id. 200. But the recovery is limited to the value of the share of the plaintiff in the property: *Dinehart v. Wilson*, 15 Barb. 598. In the case of a partnership this interest is to be determined without reference to the solvency of the partnership, or to the state of its accounts: *Berry v. Kelly*, 4 Rob. 123. It was decided, however, in *Hull v. Carnley*, 11 N. Y. 508; S. C., 1 Abb. Pr. 158, reversing same case, 2 Duer, 106, that the sheriff who has assumed to sell the entire interest in mortgaged chattels, upon a sale under execution against the mortgagor, is not liable to the mortgagee, if at the time of the sale the mortgagor had the right to the possession of the goods as against the mortgagee. Referring to the cases of which the principal case is a type, the judge delivering the opinion said: "The cases which have been decided respecting the sales of the goods of copartners or joint owners, upon executions against one partner or joint owner, have a stronger analogy to this case, but I think they do not govern it: *Phillips v. Cook*, 24 Wend. 389; *Waddell v. Cook*, 2 Hill, 47, and note; *Walch v. Adams*, 3 Denio, 125. All the partners or joint owners have an equal right to the possession with the one against whom the execution issues. The interruption of that possession is an injury which can be only justified by the process. By assuming to sell the whole interest when the authority extends only to an aliquot share, and delivering possession to the purchaser pursuant to such sale, the other owners are immediately divested of a concurrent right of possession. The authority to disturb the possession of the other owners is conferred by law, and to be effectual must be exercised in the manner which the law directs; and doing it in any other manner is an abuse of authority, and renders the officer a trespasser from the beginning. This is the ground upon which the doctrine is placed by Judge Cowen, in *Waddell v. Cook*, and upon this principle only can the decision be sustained. In the case under review there is, as before remarked, no disturbance of any present right of possession. The mortgagee is in the same precise situation after the sale as before. No possession is invaded and no right is disturbed. It would be strange if in such a case a trespass had been committed."

Nor will trespass lie against a purchaser at a sale under an execution against one tenant in common, where the sheriff assumes to sell the entire property: *Piero v. Betts*, 2 Barb. 635, distinguishing the principal case.

UNITED STATES v. WHITE ET AL.

[2 HILL, 59.]

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST THE UNITED STATES, although they sue upon a note or cause of action acquired by transfer from a private person, unless the statute had begun to run before such transfer was made.

PLEA OF NON ASSUMPSIT INFRA SEX ANNOS is not any answer to a count in a promissory note payable at a specified time after date.

IF A COUNT IS BAD IN SUBSTANCE, the defendant must prevail though his plea thereto is bad and is demurred to.

IF ANY ONE COUNT IN A DECLARATION IS GOOD, a demurrer to the whole

declaration must be overruled though the other counts are bad in substance.

NOTE PAYABLE "TO THE ORDER OF THE INDORSER'S NAME," is negotiable. UNITED STATES MAY SUE IN THEIR OWN NAME on a note indorsed to them, whether it is negotiable in form or not.

DECLARATION charging defendants as makers of a promissory note, by which they promised to pay to "the order of the indorser's name, at the Utica bank, eight hundred dollars and twenty-five cents," four months after date. The first count described the note as payable to the order of the person who should thereafter indorse it; that, when made, it was delivered to Samuel Adams, who thereafter on the same day indorsed it payable to plaintiffs and delivered it to them. The second count averred the making of the note and set out a copy thereof; that it was delivered to Adams, who indorsed it payable to the order of the "Navy commissioners of the United States," and then delivered it to the plaintiffs; that the note was made, executed, indorsed, and delivered as aforesaid for the sole and proper use of plaintiffs, to secure an antecedent debt, etc. The second plea of defendants was to both counts *actio non accrevit infra sex annos*, etc.; the third plea was to both counts *non assumpsit infra sex annos*, etc.; the fifth plea was to the second count, and denied that part thereof which stated that the note was made, etc., for the use of plaintiffs, and to secure an antecedent debt. Plaintiffs specially demurred to each plea. Defendants joined in the demurrer.

J. A. Spencer, United States district attorney, for the plaintiffs.

O. P. Kirkland, for the defendants.

By Court, COWEN, J. The first question arises on the second and third pleas. It is not denied that the plaintiffs are in general privileged against the statute of limitations: *Vide United States v. Hoar*, 2 Mason, 311; *Same v. Buford*, 3 Pet. 12; *People v. Gilbert*, 18 Johns. 227; but it is insisted that the rule does not apply to a claim which they take as transferees from another, even though they acquire the legal interest, and are therefore entitled to an action in their own name. This would no doubt be true, if the statute had begun to run against the claim while it was in the hands of the assignor; but in the case at bar it did not. We must take it on the pleadings that the plaintiffs became holders and owners of the note before it fell due. They took a legal right in a demand against which the statute might have run in the hands of the assignors, had it continued there

long enough. But the statute was not inherent in it, any more than in land or any other property which may come to be owned by the United States: *Vide United States v. Buford*, 3 Pet. 12, 30. The third plea is admitted to be bad. It is *non assumpsit*, *infra*, etc., to a note payable after date. Though the demurrer be to the pleas, and they bad, yet the defendants may still prevail if the counts be defective in substance. The second count is especially assailed; but conceding that to be bad, this is not enough for the defendants' purpose. Upon the state of pleading it is sufficient that the first count be good; for the pleas are to both. The objection is therefore of the nature of a demurrer to the whole declaration, which shall stand if any one count be good.

The first count sets forth that the defendants made and delivered their promissory note to Samuel W. Adams, and thereby promised to pay to the order of the person who should thereafter indorse said note. It then avers an indorsement to the plaintiffs by Adams. This clearly entitles the plaintiffs to sue in their own name, and would have entitled an ordinary person. The maker of a note may bind himself to the bearer generally; and a promise to pay such bearer as shall come to the possession of the note in any given mode, is but a more limited exercise of the same power. It is like making a note payable in blank, which may be filled up by a *bona fide* holder with his own name; indeed, it is but a more enlarged form of the ordinary promise to the payee or order, or the order of the payee. If it could have effect in no other way, we should hold it payable to bearer generally, like a bill payable to a fictitious payee or order: *Gibson v. Minet*, 1 H. Bl. 569. It may, says Mr. Chitty, be collected from this and its kindred cases, "that any words in a bill, from whence it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person:" *Chit. on Bills*, 218, Am. ed. of 1839.

The case may also be considered in another point of view, even if this note be not strictly negotiable, but stand on the footing of an ordinary chose in action. The defendants have, by the form of the paper, given power to any one by indorsement to make an assignment of the debt, or, which is the same thing in effect, to point out and fix the payee. This assignment is made to the United States, which, like the king of England or the people of this state, may, with great propriety, and in anal-

ogy to the very principle which forbids the statute of limitations to run against them, in virtue of their prerogative, take the legal interest by the assignment of any chose in action: 2 Bl. Com. 442; *United States v. Buford*, 3 Pet. 12, 30, *per* McLean, J.

On the whole, we can not bring ourselves to doubt that the first count of the declaration is good. This disposes of the second and third pleas. They are both bad; and can not escape the consequence of being so, by the attack which has been made upon the declaration.

We come now to a consideration of the fifth plea, which is to the second count only. The demurrer to this plea involves the same course of inquiry as the other demurrers. It is clearly bad in itself for duplicity; but claims and is entitled to the same privilege with the other pleas, that of going back and attacking the count which it professes to answer. In that count, the note is stated as being payable to the order of the indorser's name; and the interest might clearly have been fixed in any one by an indorsement like that which we have supposed competent to transfer the note as it is described by the first count. We think, however, if the United States are to be treated as an ordinary person, the legal interest in the note must be considered as having stopped, and is still continuing to rest in the navy commissioners. The order of Adams runs to them; and although enough appears, perhaps, to raise an equitable interest in the United States, yet, properly, either Adams should have indorsed and delivered the note to the United States, or, at least, the navy commissioners should have done so after his indorsement to them. We want to see a legal interest in the party who sues a note. It is not enough that he be a mere *cestui que trust* under a special indorsement to another.

But we think the second count contains enough to show an oral assignment to the United States. The note is in itself available, as against the makers, in the name of any actual indorsee of Adams or any other. He made his order in favor of the navy commissioners. But connected with this, there is an averment which gives another character to the whole transaction. It is, that all this machinery was originally got up by makers, indorser, and indorsees, to secure a debt actually due to the United States; and that the note was made and immediately indorsed to the commissioners, but delivered to the United States for that purpose. In short, the amount of the averment is, that the note, though not in form payable to the

United States, was in effect assigned to them on the very day of its date for a valuable consideration, viz., the precedent debt due from some one to them. We entertain no doubt, on reflection, that the United States hold the same prerogative for the purpose of taking by assignment the legal interest in a chose in action, as the king or queen regent of England.

The result is, that judgment must be given for the United States upon all the demurrers.

Judgment for plaintiffs.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

LEDYARD v. BUTLER.

[9 PAIGE'S CHANCERY, 132.]

BONA FIDE MORTGAGEE OF FRAUDULENT GRANTEE of premises conveyed in fraud of creditors, having no notice of the fraud, is entitled to a preference over a creditor of the fraudulent grantor who obtains judgment and buys in the premises on execution after the fraudulent conveyance, but before the mortgage, but whose deed is not recorded until after the mortgage is recorded, although part of the amount loaned on the mortgage is not paid over to the mortgagor until after the sheriff's deed is recorded.

PRIORITY BETWEEN PURCHASERS FROM FRAUDULENT GRANTOR and fraudulent grantee, respectively, is with him who first records his deed.

MORTGAGEE IS PURCHASER to the extent of his interest within the meaning of the statute of frauds.

APPEAL from a decree of the vice-chancellor foreclosing a certain mortgage in favor of the complainant; Snyder, the appellant, claiming that his title was paramount to the mortgage. The mortgage was executed to the complainant in 1830, and duly recorded. Part of the money loaned on the mortgage was delivered at the time of the mortgage, and the remainder a few weeks afterwards. Butler, the mortgagor, was in possession at the time, claiming under a deed from his father executed in 1823. After that deed was executed, and before the execution of the mortgage, one Morss, a creditor of the father, brought suit and recovered judgment against him, and on execution issued thereon, purchased all the right, title, and interest of his judgment debtor in the premises in dispute. The sheriff's deed to Morss was executed and recorded about a week after the

recording of the complainant's mortgage. Morss afterwards brought ejectment and recovered possession from the mortgagor, on the ground that the latter's deed from his father was fraudulent and void against Morss, as creditor of the father. Morss was made a party to the suit for foreclosure subsequently brought by the complainant, and in his answer set up fraud in the deed to the mortgagor. Before the final hearing, Morss conveyed to Snyder, who was made a party, and now appeals from the decree of foreclosure.

S. Sherwood, for the appellant.

T. T. Payne, for the respondent.

By WALWORTH, Chancellor. The equities of the parties are equal in this case; the appellant claiming in opposition to the fraudulent deed, and the respondent being a *bona fide* mortgagee of the premises conveyed by that deed, without notice of the fraud. The only question therefore, is, which party has the better legal right. On that question I have no doubt as to the correctness of the decision of the vice-chancellor. The judgment and proceedings against Giles Butler, subsequent to the deed to his son, could not be constructive notice to a purchaser or mortgagee of the latter. For upon searching the records and finding an absolute conveyance from the father, in July, 1823, the person who was about to purchase from the son, or to loan money to him upon his bond and mortgage, would not be bound to go further and search the records for the purpose of ascertaining whether subsequent judgments might not have been recovered against the father.

The case of *Anderson v. Roberts*, in the court for the correction of errors, 18 Johns. 515 [9 Am. Dec. 235], settles the question, that a *bona fide* purchaser from a fraudulent grantee is entitled to a preference over a subsequent purchaser under a judgment against the fraudulent grantor. And the supreme court, in *Jackson v. Terry*, 13 Id. 471, decided that under the recording acts the priority of conveyances, as between purchasers deriving title under the fraudulent grantor and the fraudulent grantee respectively, had reference to the recording of such conveyances. And in this case the mortgage to the complainant was executed and put on record several days before the sheriff's deed to Morss was executed and recorded.

The mortgage having been in fact given on the thirtieth of March for the whole loan of one thousand three hundred dollars, as agreed for, the fact that a part of the money was not paid for

some few days thereafter could not deprive the complainant of the benefit of the security for the whole sum advanced upon the credit of that security. And a mortgagee is a purchaser, to the extent of his interest in the premises, within the meaning of the term purchaser as used in the statute of frauds: See *Chapman v. Emery*, Cowp. 278; *White v. Hussey*, Prec. in Ch. 13; *Gardiner v. Painter*, Seld. Cas. in Ch. 65; *Cormick v. Trepand*, 6 Dow, 60; Amb. 289;¹ 2 Vern. 272;² *Poulton v. Wiseman*, Noy, 105.

The decree appealed from must be affirmed with costs. And the usual direction must be given, that if the premises do not sell for sufficient to satisfy the amount due on the mortgage, with interest and costs, the appellant must pay the value of the use and occupation of the property from the time of his appeal until the delivery of the possession to the purchaser upon the sale, or so much of such value as may be necessary to satisfy such deficiency; as damages for the delay and vexation caused by such appeal.

BONA FIDE PURCHASER FROM FRAUDULENT GRANTEE, RIGHTS OF: See *Price v. Junkin*, 28 Am. Dec. 685; *Root v. French*, Id. 482; *Wineland v. Coonce*, 32 Id. 320; *Hood v. Fahnestock*, 34 Id. 489, and cases cited in the notes thereto. That a *bona fide* purchaser from a fraudulent grantee of property conveyed in fraud of creditors gets a good title, is a point to which the principal case is cited in *Sedgwick v. Place*, 10 Nat. Bank. Reg. 37; S. C., 12 Blatch. 174; *Juliand v. Rathbone*, 39 Barb. 103; *Hoyt v. Sheldon*, 3 Bos. 297. Where the equities between purchasers of land are equal, the right rests with him whose conveyance is first recorded: *Warner v. Blakeman*, 36 Barb. 520; *Fort v. Burch*, 5 Denio, 194, both citing the principal case. In *Fort v. Burch*, 6 Barb. 74, the court refer with approval to the principle recognized by the chancellor in *Ledyard v. Butler*, that the records are a part of the title, and that purchasers and mortgagees have a right to rely on the records as giving a true history of the title.

SHUFELT v. SHUFELT.

[9 PAIGE'S CHANCERY, 137.]

JUDGMENT DEBTOR IS ESTOPPED BY JUDGMENT CONFESSED voluntarily to an administrator for the amount of a note signed by such debtor, found among the intestate's papers, without intimating that he has any defense thereto, and can not question the validity of such judgment by showing that the note was founded upon an illegal consideration, unless he can show some mistake.

SUBSEQUENT MORTGAGEE CAN NOT QUESTION VALIDITY OF JUDGMENT confessed by the mortgagor, which constitutes a lien upon the mortgaged

1. *Senhouse v. Earle*.

2. *Saunders v. Dehew*.

premises, on the ground of the illegality of the consideration of the indebtedness upon which such judgment is founded, where the mortgagor himself could not file a bill to set aside the judgment.

MORTGAGEE HAVING RECOVERED JUDGMENT FOR PART of the mortgage debt at law can not have a decree of foreclosure, where that fact appears by his bill, until execution on such judgment has been returned unsatisfied, even though the bill is taken *pro confesso*.

APPEAL from a decree of the vice-chancellor. The bill was filed to foreclose a certain mortgage given by J. Shufelt to the complainant, who was the father of said J. Shufelt, and also prayed a decree that a certain prior judgment confessed by said J. Shufelt to the special administrator of one A. Mynderse, and now owned by the administrators of said Mynderse, who were also made defendants, be released and canceled by the said administrators and the premises discharged from the lien thereof, or that the lien of said judgment be postponed to the complainant's mortgage, the premises being insufficient to satisfy both, and the mortgagor being alleged to be insolvent. The ground upon which it was sought to have the judgment canceled was that the greater part of the indebtedness upon which it was founded was for tickets in lotteries in other states, the sale of which was forbidden by the laws of New York. The other facts as to the confession of judgment and the allegations in the bill concerning it, sufficiently appear from the opinion. Although the complainant alleged that no proceedings at law had been instituted for the recovery of the mortgage debt, it appeared by the bill that judgment had been recovered for the greater part of the debt, but it did not appear that execution thereon had been issued and returned unsatisfied, which the defendants, administrators of Mynderse, insisted in their answer precluded a foreclosure. The said defendants also set out the facts concerning the confession of judgment as stated in the opinion, and denied all knowledge of the consideration of the notes upon which the judgment was founded. J. Shufelt permitted the bill to be taken *pro confesso* as to him, and was examined as a witness for the complainant, against the defendants' objection. Other facts appear from the opinion. Decree, that the judgment, except as to a small part thereof, was not a preferable lien to the mortgage, but the mortgage was a prior lien, and that there be a reference to ascertain the amount due on the mortgage. The defendants appealed.

A. L. Linn and A. C. Paige, for the appellants.

A. Vanderpoel and W. H. Tobey, for the respondent.

By WALWORTH, Chancellor. It is not important in this case, to examine the question whether Mynderse, one of the administrators, was a competent witness to sustain the validity of the judgment due to the estate which he represented; as the only material fact to which his testimony related was fully proved by Mr. Linn. This last witness establishes the fact that the defendant, B. I. Mynderse, as the special administrator, had in his possession four promissory notes given by J. Shufelt to the decedent; and that Shufelt, upon being applied to by such administrator to pay or secure those notes, voluntarily consented to give the judgment in question for the amount of them. Upon that proof, which is undisputed, the important question arises whether a subsequent mortgagee, or incumbrancer, of the judgment debtor can call in question the validity of that judgment as a legal lien upon the real estate of the defendant therein. And the conclusion at which I have arrived upon that point, renders it also unnecessary for me to decide whether the defendant J. Shufelt, the mortgagor, who had suffered the bill to be taken as confessed, was a competent witness for his father, the complainant, to prove the allegation in his bill as to the illegality of the transactions which constituted the consideration of the notes for which this judgment was afterwards confessed.

There is no pretense in this case that the judgment was given in consequence of any fraudulent or collusive agreement between the special administrator and the defendant in the judgment, for the purpose of depriving the creditors of the latter of the means of recovering their just debts. Nor is there any evidence to show that the special administrator knew, or had any reason to suppose, at the time he obtained the judgment for these notes, that they were not legally due and collectible. Neither is there any allegation in the complainant's bill, that any part of the debt, for which the complainant's mortgage was given, was due from his son at the time the latter confessed the judgment in favor of the special administrator; or that the son was not at that time able to pay all his debts, in addition to this amount claimed to be due to the estate of A. Mynderse. And it appears, from the testimony, that the complainant took the mortgage with full knowledge of the existence of the judgment given to the special administrator; and that the mortgage money, exclusive of that which was already secured by the bond and warrant of the twenty-sixth of February, 1835, was advanced after he had such knowledge. It is impossible therefore for any one to wink so hard as not to see that the advance of this

additional one thousand two hundred dollars, and the giving of a mortgage sufficiently large to cover the whole value of the mortgaged premises exclusive of the previous mortgage thereon, was a mere device to enable the complainant to bring this suit for the purpose of contesting the validity of the judgment belonging to the estate of A. Mynderse; the payment of which the defendant in the judgment could not successfully resist by a suit in his own name. In other words, it was an indirect purchase, by a stranger to the transaction, of the privilege of bringing a suit in this court to set aside or overreach this judgment, by the use of the testimony of the party against whom the judgment was recovered. And I doubt whether a court of equity ought to lend its aid to carry into effect such an arrangement, under any circumstances.

In the ordinary case of the giving of an usurious mortgage, by the owner of the mortgaged premises, the statute having declared the usurious security void, the owner of the premises of course has the right to sell his property, or to mortgage the same, as though such void mortgage had never existed. And the purchaser, in such a case, necessarily acquires all the rights of his vendor to question the validity of the usurious security. For if the original mortgagor had not that right, the premises would, to a certain extent, be rendered inalienable in his hands; notwithstanding the incumbrance thereon was absolutely void as to him. He may, however, if he thinks proper to do so, elect to affirm the usurious mortgage, by selling his property subject to the payment or to the lien of such mortgage. And the purchaser, in that case, takes the equity of redemption merely, and can not question the validity of the prior mortgage on the ground of usury: *Green v. Kemp*, 13 Mass. 515 [7 Am. Dec. 169]; *Bridge v. Hubbard*, 15 Id. 103 [8 Am. Dec. 86]. But in the case of a judgment, like the present, which is a valid and subsisting debt against the defendant, and a lien upon his real estate, at least until he thinks proper to institute some legal proceedings to set aside such judgment, there is a manifest impropriety in permitting every voluntary purchaser, or mortgagee, of any portion of the property upon which such judgment is a lien, to file a bill in his own name to impeach the consideration of that judgment. My learned predecessor, Chancellor Kent, in the case of *French v. Shotwell*, 5 Johns. Ch. 567, came to the conclusion that a subsequent purchaser, who was aware of the existence of such a judgment at the time of his purchase, was not authorized to call the judgment in question where the

judgment debtor himself did not think proper to do so. He says, "the judgment precludes on general principles; for the purchaser voluntarily comes in under the judgment *pro bono et malo*; and except in the special case in which the judgment was confessed collusively and by a corrupt agreement to defraud some subsequent purchaser, a case hardly to be supposed, he must take the lien as he finds it, and has no business to interfere with the contracts of other people."

I am aware that the very distinguished counsel, the late Mr. Henry, who filed the bill and argued the case of *French v. Shotwell*, was not satisfied with the decision of the chancellor upon the plea in that case. And the reporter erred in supposing that there was an appeal from the chancellor's decision upon the rehearing of the plea; and that such decision was affirmed by the court of *dernier ressort*, as is stated in the report: See 20 Johns. 668.¹ It appears from the printed case, and from the opinion of the then chief justice delivered in the court for the correction of errors, both of which I formerly had occasion to examine, that the only appeal was from the decretal order of August, 1822, overruling certain exceptions to the defendant's answer: See 6 Johns. Ch. 235.¹ And the complainant having lost the right to appeal from the order allowing the plea, by his neglect to enter his appeal within fifteen days, his counsel attempted to review the decision of the chancellor upon the plea, under the appeal from the subsequent order of August, 1822. But the chief justice stated distinctly, in his opinion, that the court for the correction of errors could not upon that appeal examine the correctness of the plea; and that the appellate court was confined to the question arising on the master's report upon exceptions to the answer. I will not therefore say it is conclusively settled that a subsequent purchaser, or mortgagee, can in no case call in question the validity of a judgment voluntarily confessed by the vendor or mortgagor under whom he claims title. But in a case like the present, where an individual apparently indebted to the estate of a deceased person, upon being called on by the representative of the decedent to pay or secure the debt, voluntarily confesses a judgment for the amount, without intimating that he has any legal or equitable defense to the debt or any part thereof, I think the debtor himself is estopped from questioning the validity of such a judgment, in any court, unless he can show that some mistake has occurred; in the same manner as he would be estopped if the judgment

1. *French v. Shotwell*.

had been recovered against him in an ordinary suit at law for the collection of the debt. This bears no resemblance to the common case of giving a bond and warrant to secure the performance of an agreement for an usurious loan, or where the judgment itself constitutes a part of an immoral and void agreement; in which cases this court, as well as the court of law in which the judgment has been entered, may set the same aside upon equitable principles. And if J. Shufelt himself would not have been authorized to file a bill in this case to set aside the judgment, on account of the alleged illegality of the consideration of the notes which constituted the original indebtedness, a subsequent grantee or mortgagee of the property upon which that judgment is a lien certainly can not question the validity of such lien.

I am also inclined to think there is not sufficient on the face of the complainant's bill to show that the consideration of the notes for which the judgment was confessed was illegal. For it is not alleged that the foreign lottery tickets, for which those notes were given, were sold in this state, or that A. Mynderse, at the time of such sale, resided or kept his lottery office in the state of New York. But this is a mere technical defect; as the proof shows that he resided at Schenectady, and the sales of the lottery tickets were unquestionably made there, from whatever place the vendor might have procured them.

There is, however, a substantial and fatal defect in the complainant's bill, considering it as a bill for the foreclosure of the mortgage given to him by his son. For it appears from the bill itself, as well as from the evidence in the case, that the complainant has recovered a judgment in the supreme court for more than two thirds of the debt secured by the mortgage. And the statute is imperative, that, upon a bill of foreclosure, if it appears that any judgment has been obtained in a suit at law for the moneys demanded by such bill, or any part thereof, no proceedings shall be had in such case unless to an execution, against the property of the defendant in such judgment, the sheriff shall have returned the execution unsatisfied, in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises: 2 R. S. 192, sec. 146, new ed., sec. 162. The judgment of the complainant, which was entered in this case in February, 1835, is a judgment for a part of the moneys demanded by him in this bill; for the recovery and satisfaction of which moneys he seeks a foreclosure and sale of the mortgaged premises. In such a case,

as this court has recently decided, if the fact of the recovery of judgment appears in the bill, the complainant must go still further and show that he has exhausted his remedy at law, upon the judgment; or the defendants in the foreclosure suit may demur to the bill on that account, or they may urge that objection in their answer, to prevent a decree of foreclosure. Or, if this objection does not appear upon the bill, and the complainant has falsely alleged that no proceedings at law have been had, the defendant may plead the recovery of such judgment in bar of the foreclosure suit: *The North River Bank v. Rogers*, 8 Paige, 648. And if the fact of the recovery of such judgment appears in the bill itself, the court can not make a decree of foreclosure until the execution has been returned unsatisfied; although the defendant has suffered the bill to be taken as confessed against him.

For these reasons the decree appealed from must be reversed, with costs to the appellants. And the bill, so far as it seeks to call in question the validity of their judgment against the mortgagor, or to affect the priority of the lien thereof upon the mortgaged premises, must be dismissed absolutely and unconditionally, with costs to them. But so far as it seeks a foreclosure of the complainant's mortgage, it must be dismissed as to all the defendants; without prejudice to his right, after he shall have exhausted his remedy at law upon his judgment for the recovery of the part of the mortgage moneys included therein, to file a new bill to foreclose and obtain satisfaction of his mortgage out of the mortgaged premises, subject to the prior lien of the appellants thereon, by virtue of their judgment and the lien of the mortgage to the defendant Mynderse upon the same premises.

GRANTEE CAN NOT DISPUTE VALIDITY OF LIEN CREATED BY GRANTOR, WHEN.—The principle stated by the chancellor in the course of his opinion in the foregoing case, that where one who has given a usurious mortgage on his land conveys the land subject to the mortgage, his grantee can not set up usury in the mortgage, is mere *dictum*, as the case has nothing to do with usury; but the principle itself is well settled, and *Shufelt v. Shufelt* is very frequently cited as an authority to support it: *Hartley v. Tatham*, 2 Abb. App. Dec. 339; S. C., 1 Keyes, 227; *Merritt v. Millard*, 3 Abb. App. Dec. 293; S. C., 4 Keyes, 214; *Knickerbocker Life Ins. Co. v. Nelson*, 7 Abb. N. C. 182; S. C., 78 N. Y. 150; *Green v. Morse*, 4 Barb. 336; *Morris v. Floyd*, 5 Id. 134; *Schermerhorn v. American Life Ins. etc. Co.*, 14 Id. 167; *Strong v. Strickland*, 32 Id. 286; *Murray v. Barney*, 34 Id. 346; *Berdan v. Sedgwick*, 40 Id. 362; *Root v. Wright*, 21 Hun, 348; *Brown v. Hall*, 5 Lans. 182; *Hartley v. Harrison*, 24 N. Y. 172; *Wells v. Chapman*, 4 Sandf. Ch. 339; *Henderson v. Belleu*, 45 Ill. 325; *Valentine v. Fish*, Id. 468. And generally the defense of usury

can be made only by one who is in privity with the borrower: *Murray v. Judson*, 9 N. Y. 85; *Williams v. Tilt*, 36 Id. 326, also citing the principal case. But where one who has made a usurious mortgage conveys the land generally, or free of the mortgage, the grantee may set up the defense of usury, for then he is in privity with the mortgagor: *Brooks v. Avery*, 4 N. Y. 229; *Bullard v. Raynor*, 30 Id. 200; *Mather v. Lanfroy*, 86 Ill. 521. See generally as to who may set up the defense of usury: *Lloyd v. Keach*, 7 Am. Dec. 256 and note; *Warren v. Crabtree*, 10 Id. 51.

MORRIS CANAL COMPANY v. EMMETT.

[9 PAIGE'S CHANCERY, 168.]

VENDOR OF LAND IS NOT ENTITLED TO DEDUCTION FOR DEFICIENCY in quantity of the land conveyed, from the amount of the bond given therefor, where the sale is *per aversionem*, or for a gross sum for the whole premises, and not at a stipulated price per foot or acre, the land being described by designated boundaries, followed by a specification of the quantity, unless there has been fraud or willful misrepresentation by the vendor.

APPEAL from a decree of the assistant vice-chancellor for the foreclosure of a certain mortgage given by the defendants for the purchase price of the mortgaged premises. The land was described in the deed and mortgage as lots numbers 1, 2, 3 on a certain map; bounded on the north and west by Water and Walnut streets, on the south by the land of a third party, and on the east by lot No. 4, containing together in front on Water street and in rear seventy-five feet, on Walnut street seventy-five feet, "and on the easterly side seventy-five feet, more or less." The defendants claimed a deduction from the amount of the bond because there was a deficiency of five feet in the depth of the lots, as shown by a survey. The deduction was disallowed, and the defendants appealed.

E. J. Wilson, for the appellants.

T. W. Tucker, for the respondents.

By **WALWORTH**, Chancellor. The assistant vice-chancellor was unquestionably right in refusing to make any deduction from the amount of the bond and mortgage in this case, on account of the alleged deficiency in the premises, for a part of the purchase money of which these securities were given. The sale to Emmet was clearly a sale *per aversionem*, as it was called in the Roman law; that is, for a gross sum to be paid for the whole premises, and not at a specified price by the foot or acre. In such sales the purchaser is entitled to the quantity contained

within the designated boundaries of the grant, be it more or less; without reference to quantity or measure of the premises which is mentioned in the contract or conveyance. And where there has been no fraud or misrepresentation he is neither liable for a surplus, nor entitled to a deduction on account of any deficiency, in the quantity or measure of the premises mentioned in the contract or deed: *Mann v. Pearson*, 2 Johns. 87; *Powell v. Clark*, 5 Mass. 355 [4 Am. Dec. 67]; *Beach v. Sternes*, 1 Aiken, 325. The rule adopted by our courts in this respect, although it may not carry into effect the real intention of the parties in all cases, is calculated to prevent litigation. It is also more equitable than the rule of the civil law; which, in such cases, gave the excess to the purchaser, without compensation, where the property was sold by a specific description followed by the mention of the quantity or measure; although he was not entitled to a deduction from the price in case of a deficiency: Pothier Cont. de Vente, n. 251, 255. The civil code of Louisiana, however, has placed both parties to the contract upon an equality in this respect; by declaring that there can be neither increase nor diminution of price, on account of disagreement of measure, when the object of sale is designated by the adjoining tenements and sold from boundary to boundary: Civ. Code La., art. 24, 71. That is the principle adopted by our courts. And under this article it has been decided by the supreme court of Louisiana, that where several lots were sold together, designated by their numbers in a particular square, and with reference to the plan of the allotment, although the depth of each lot was specified, and fell short of the number of feet mentioned in the conveyance, the purchaser was not entitled to claim a diminution of the price on account of such deficiency. See *Kirkpatrick v. McMillen*, 14 La. 497.

The cases in which courts of equity have interfered are all referred to by Mr. Justice Story in *Stebbins v. Eddy*, 4 Mason, 414; and it is only necessary for me to cite his opinion in that case as containing a correct exposition of the law on this subject. The cases in which equitable relief has been granted are generally those in which the sale of the land has been made by the acre or the foot; or where there has been fraud or willful misrepresentation on the part of the vendor, to induce the purchaser to suppose the quantity of land was greater than it actually was. In the case under consideration, however, there is no allegation or proof on the part of the appellants that the

premises were sold by the foot, or that the price to be paid had any reference to the actual depth of the lots; or that the purchaser was deceived by any misrepresentation as to the number of feet the lots extended back from Water street. I am also inclined to think the words "more or less," with which the description of the premises concludes, were intended to apply to the depth of the lots upon Walnut street as well as upon the easterly line of the premises; thereby clearly indicating that both parties to the conveyance were ignorant of the actual depth of either of the three lots conveyed.

The decree appealed from must therefore be affirmed with costs.

DEFICIENCY IN QUANTITY OF LAND, vendee is not generally entitled to relief in case of, or to any deduction in, the price, unless the sale is by the acre or there is fraud or misrepresentation. See *Jolliffe v. Hite*, 1 Am. Dec. 519; *Pendleton v. Stewart*, 2 Id. 583; *McCoun v. Delany*, 6 Id. 635; *Smith v. Evans*, Id. 436; *Bond v. Quattlebaum*, 10 Id. 702; *Johnston v. Quarles*, 22 Id. 163; especially where the deficiency is slight: *King v. Bardeau*, 10 Id. 312; see, also, *Nelson v. Matthews*, 3 Id. 620. But where the sale is by the acre, and there is an unusual deficiency, equity will relieve: *Whaley v. Eliot*, 10 Id. 737; see, also, *Jopling v. Dooley*, 24 Id. 450. And so equity will relieve where there is fraud or misrepresentation on the part of the vendor: *Pringle v. Samuel*, 13 Id. 214, and see the note to that case. The doctrine laid down in the principal case on this point is approved in *Noble v. Googins*, 99 Mass. 235; *Board of Commissioners v. Younger*, 29 Cal. 179, and *Cram v. Union Bank*, 42 Barb. 434. It is referred to and commented on also in *Belknap v. Sealey*, 14 N. Y. 151, where Comstock, J., says, however, that the remarks made by the chancellor to the effect that when there has been no fraud or misrepresentation, the purchaser is neither liable for a surplus nor entitled to a deduction on account of deficiency, "were unnecessary to the decision," and "not made upon deliberation." In that case it was held that a court of equity would rescind an executory contract for the sale of land on the application of the vendee on the ground of a considerable mistake in the quantity, though the land was described by metes and bounds, and the words "more or less" after the designation of quantity, where the mistake on the purchaser's part was caused by a misrepresentation by the vendor, which was not fraudulently made.

HAWLEY v. BRADFORD.

[9 PAIGE'S CHANCERY, 200.]

WIFE IS ENTITLED TO RIGHTS OF SURETY FOR HUSBAND where she mortgages her separate estate or the reversionary interest in her realty to secure his debt, but not where she joins in a mortgage of his land for his debt.

DECEASED MORTGAGOR'S WIFE IS ENTITLED TO DOWER IN SURPLUS only of the proceeds of the mortgaged premises, after paying the mortgage debt and costs of foreclosure, where she has joined in a mortgage of his land

for his debt, and the land has been sold on foreclosure, and can not claim dower in the whole proceeds against judgment creditors of the husband; but her interest in the residue is free of any charge for the costs of a reference to determine the rights of the creditors therein.

EXCEPTIONS to master's report, on a reference to ascertain the respective rights of the defendants in the surplus of moneys realized on a foreclosure sale of certain premises, under a mortgage executed by one Bradford, the owner of the land, in which his wife joined. Several of the defendants were judgment creditors of Bradford, having liens on the equity of redemption. Their claims exceeded the surplus proceeds after paying the mortgage, and the question was as to whether the mortgagor's widow was entitled to dower in the whole proceeds of the foreclosure sale, provided it did not exceed the surplus after paying off the mortgage, or could claim her dower only in the surplus after paying the mortgage and costs. The master's report gave her dower only in the surplus, calculated upon the principle of life annuities, subject to a deduction for a proportionate share of the costs of reference.

M. T. Reynolds, for Mrs. Bradford.

James McKown, for the creditors.

By WALWORTH, Chancellor. It is settled law that where the wife pledges her separate estate, or the reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety: *Clancy's Husb. and Wife*, 589; *Neimcewicz v. Gahn*, 3 Paige, 614; S. C., 11 Wend. 312. If the same principle is to be applied to the case of the wife joining in a mortgage of the real estate of the husband, for the purpose of barring her contingent right of dower therein, the claim of the exceptant in this case must be sustained. For the equitable claim of the surety to have the mortgage satisfied out of that estate or interest in the premises which belongs to the principal debtor alone, is entitled to a preference, over the claims of the subsequent incumbrancers to have their debts satisfied out of the same estate or interest in the premises. I am not aware of any decision, however, in which the principle of suretyship has been applied to a case like the present. And the two cases which came before my learned predecessor, Chancellor Kent, were disposed of upon the supposition that the wife who had joined the husband in a mortgage of his estate was not entitled to have such mortgage satisfied out of the husband's interest in the premises exclusively, so as to give her the full ben-

est of her dower in the whole premises, and not in the equity of redemption merely: *Tabele v. Tabele et al.*, 1 Johns. Ch. 45; *Titus v. Neilson*, 5 Id. 452. Strictly speaking, the wife has no estate or interest in the lands of her husband, during his life, which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband; but without impairing her contingent right of dower in the equity of redemption.

The master was, therefore, right in supposing that Mrs. Bradford was not entitled to be endowed of the whole proceeds of the mortgaged premises, but only of the surplus which remained after paying the mortgage debt and the costs of foreclosure. Upon the authority of the case of *Tabele v. Tabele*, however, she was entitled to the value of her life interest in one third of such surplus, free from any charge thereon, for the costs of the reference, as between her and the creditors of the husband. The exception must be allowed to that extent merely; and the report must be modified so far as it charges her portion of the fund with any part of the costs of the reference. Those costs must be paid out of the residue of the surplus fund; and neither party is to have costs as against the other upon the exception to the report. An order to distribute the surplus moneys in the court, and the income, if any, which has accrued thereon, will be entered according to the principles of this decision.

WIFE JOINING IN MORTGAGE OF HUSBAND'S LAND, effect of, as to dower: See *Popkin v. Bumstead*, 5 Am. Dec. 113; *St. Clair v. Morris*, 34 Id. 415, and see the note to the latter case. The widow of the mortgagor in such a case is entitled to dower in the equity of redemption only, or in the surplus only, after paying off the mortgage: *House v. House*, 10 Paige Ch. 165; *Matthews v. Duryee*, 4 Keyes, 535; S. C., 3 Abb. App. Dec. 221. It is said, however, in *Frost v. Peacock*, 4 Edw. Ch. 695, to be doubtful whether the widow is entitled to dower in the surplus on a foreclosure sale where the husband was living when the sale took place and for a considerable time afterwards. In all these cases *Hawley v. Bradford* is cited as an authority. It is cited also in *Church v. Church*, 3 Sandf. Ch. 438, to the point that a widow is not to be charged with any part of the costs of administering a fund in which she has a dower right.

WIFE MORTGAGING HER SEPARATE ESTATE to secure a debt of her husband is entitled to all the rights of a surety: *Vartie v. Underwood*, 18 Barb. 563; *Savage v. Winchester*, 15 Gray, 456, approving the *dictum* in the principal case.

GRANT v. VAN SCHOONHOVEN.

[9 PAIGE'S CHANCERY, 256.]

IN APPOINTMENT OF GUARDIAN AD LITEM for an infant defendant, where the father is complainant, the grandfather, being the next nearest relative of the infant, is entitled to be consulted.

PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM for an infant defendant by a master must show that the infant has been served with process of subpoena to appear, or that he has been proceeded against as an absentee and an order obtained for his appearance under the statute.

PARTIES HAVING CONFLICTING INTERESTS CAN NOT BE JOINED as complainants in a suit.

BILL FILED BY HUSBAND IN THE NAME OF HIMSELF AND WIFE is considered his bill merely, and a decree in such suit is not binding on the wife in any future litigation.

WIFE SHOULD BE MADE DEFENDANT IN SUIT BROUGHT BY HUSBAND to set aside a conveyance of property to trustees for her separate use for life, with remainder to her children; and if she is joined as complainant in a suit brought against the trustees and the infant children, the latter should be permitted by their guardian *ad litem* to put in a special answer for the purpose of raising the objection and compelling the complainant to amend by making the wife defendant.

BILL filed by husband and wife against their infant children and certain trustees, to set aside a conveyance to the trustees for the benefit of said infants. The grandfather of the children, upon petition to the chancellor showing that the father was proceeding in hostility to the children, obtained an order for the appointment of a guardian *ad litem*, but before the order was entered, a creditor of the father not related to said infants, applied to the master, without the knowledge of any of the other relatives of the children, the application being prepared by the complainant's solicitor, and procured the appointment of another person as guardian *ad litem*, who immediately put in a general answer. The grandfather then filed a petition showing these facts and asking that the appointment be set aside. Other facts appear from the opinion.

G. W. Kirtland, for the petitioner.

Cyrus Stevens, for the complainants.

By **WALWORTH**, Chancellor. In the appointment of a guardian *ad litem* for infant defendants, the court should always select such person for that purpose as will be most likely to protect the rights of the infants. And in this case, where the natural guardian and protector of his children is himself the complainant and prosecuting his suit against them, their grand-

father, who is their next nearest relative, and who has assumed the burden of their defense, is entitled to be heard in the selection of a guardian *ad litem* for that purpose, in whom he has confidence, and with whom he can communicate freely on the subject. If the appointment in this case was, therefore, strictly regular, it would be almost a matter of course to grant the prayer of this petition, even without the advice of the counsel employed for the defense, that it is of importance to the interests of the infants.

The appointment by the master, moreover, was not strictly regular, independent of the objection that the person who applied for the appointment was rather the friend of the complainant, and interested in his success, than the friend of the infants, and solicitous that they should succeed in their defense. To authorize the appointment of a guardian *ad litem* of an infant defendant, by an order of course, upon the certificate of a vice-chancellor or special master, under the provisions of the one hundred and forty-sixth rule, the petition should distinctly show an authority to make the appointment on the ground that the infant had been served with process of subpoena to appear in the suit, or that he had been proceeded against as an absentee, and an order obtained for his appearance under the statute. But the petition, upon which the common order was obtained in this case, merely stated that a bill had been filed against the infant defendants, who were residents of the state of Vermont; without showing that they had been served with process in this state, or that an order for their appearance as absentees had been obtained, and served, or published, so as to authorize the master to nominate a guardian *ad litem* for them.

It may also be necessary for the infants to put in a special answer, in this case, for the purpose of protecting their rights and putting in issue facts material to their defense. And I am inclined to think there is sufficient on the papers before me to show that a special answer should have been put in, for the purpose of raising the objection that these complainants are improperly joined and are not before the court in such a manner as to authorize a final decree disposing of the case upon its merits.

Persons having adverse or conflicting interests in reference to the subject-matter of the litigation, ought not to join as complainants in the suit: See *Davies v. Quarterman*, 5 Lond. Jur. 93. And where a bill is filed by the husband, in the name of himself and wife, it is considered the bill of the husband merely; so that the decree made in such suit is not binding upon the

wife in any future litigation: *Reeve v. Dalby*, 2 Sim. & Stu. 464; *Wake v. Parker*, 2 Keen, 73; *England v. Downs*, 1 Beav. 96; *Owden v. Campbell*, 8 Sim. 551. For that reason where a bill is filed by the husband and wife in regard to her separate estate, in which the husband has no common interest with her, the defendants, if they think proper to do so, may insist that the wife shall prosecute in her name by her next friend; so that the defendant may not be subjected to the expense of a further litigation in case they succeed in their defense to this suit. On the other hand, if the husband seeks to deprive his wife of an estate held in trust for her separate use, he can not obtain a decree for that purpose by joining her as a complainant with himself in his suit against her trustees; but should make her a party defendant in such suit.

Here, so far as I can understand the case upon the papers before me, the father of these infant defendants has filed his bill to set aside a conveyance of property to trustees, for the separate use of his wife for life, with remainder to her children. If so, she has an interest adverse to him in the subject-matter of this litigation, and should have been made a defendant in the suit, instead of a complainant. And the infants should be permitted to put in a special answer, to enable their guardian *ad litem* to insist upon this objection, for the purpose of compelling the complainant to amend his bill accordingly; so that a final decree in the cause may be made at the hearing, upon the merits, instead of having the bill dismissed upon this matter of form merely, and thereby subjecting the infants to the expense of making their defense a second time.

The guardian appointed upon the certificate of the master, under the defective petition, must therefore be discharged; and the guardian *ad litem*, heretofore appointed by the special order of the court, must be permitted to put in a new answer within the usual time after service of a copy of the complainant's bill upon him.

BILL FILED BY HUSBAND AND WIFE for her separate estate is considered his bill, and she is not bound thereby: *Sherman v. Burnham*, 6 Barb. 412; *Howland v. Fort Edward Paper Mill Co.*, 8 How. Pr. 508; *Alston v. Jones*, 3 Barb. Ch. 401; *Ackley v. Tarbox*, 31 N. Y. 566; S. C., in court below, 29 Barb. 517. The wife should, therefore, sue alone by a next friend other than her husband in such a case: *Sherman v. Burnham*, 6 Barb. 412; *Ackley v. Tarbox*, 29 Id. 516; S. C., in court of appeals, 31 N. Y. 564; *Brownson v. Gifford*, 8 How. Pr. 394; *Cook v. Rawdon*, 6 Id. 234; *Smith v. Kearney*, 9 Id. 468. Where a bill is filed by the husband, respecting the wife's separate estate, and his interest is adverse to hers, as in the principal case, she should

be made a party defendant: *Alston v. Jones*, 3 Barb. Ch. 401; *Hammond v. Pennock*, 61 N. Y. 159. In all these cases, *Grant v. Van Schoonhoven* is cited as authority.

PARTIES WHOSE INTERESTS ARE ADVERSE CAN NOT BE JOINED as complainants in a bill: *McMahon v. Rauhr*, 3 Daly, 117; *Struppman v. Muller*, 52 How. Pr. 217; 4 Blatch. 433, citing the principal case.

APPOINTMENT OF GUARDIAN AD LITEM.—The doctrine of the principal case on this point is held not to apply to an appointment of a guardian *ad litem*, which is made by the court and regulated by statute: *Varian v. Stevens*, 2 Duer, 637.

CARPENTER v. GRIFFIN AND SPENCER.

[9 PAIGE'S CHANCERY, 310.]

UNDER LEASE OF FARM WITH THE COWS AND SHEEP thereon for a term of years at an annual rent, with the following stipulation: "Cows of equal age and quality to be returned at the end of the said term, and also the sheep;" the property in the cows and sheep on the farm during the term, whether they be the same as those originally received, or others purchased by the tenant in lieu of those which have been sold, is in the tenant, and the same may be seized and sold by his creditors, and the lessor can not restrain such seizure and sale, without a provision in the lease reserving to him a lien on the stock on the farm.

APPLICATION for dissolution of an injunction. The defendant Spencer leased of one Fowler in 1836, for the term of five years at an annual rent, a certain farm, with the sheep thereon and thirty cows, with the following stipulation: "Cows of equal age and quality to be returned at the end of the said term, and also the sheep." The complainant subsequently purchased the farm of Fowler with his interest in the stock, etc. In 1839 the defendant Griffin, a judgment creditor of Spencer, levied on the cows on the farm, together with the hay, farming and dairy utensils, etc., when the complainant filed his bill and obtained against both defendants an injunction restraining any sale or disposition of the property, which injunction the defendants now ask to have dissolved. It appeared that eight of the cows levied on were placed on the farm by Fowler, and nine others were either raised on the farm or procured with the proceeds of cows and sheep sold. The remaining twenty had been purchased by Spencer with his own funds.

C. Stevens, for the complainant.

R. H. Gillett, for the defendants.

By WALWORTH, Chancellor. Upon the hearing of this application the injunction was directed to be dissolved so far as re-

lated to the hay, farming tools, and dairy utensils; as to which there was no pretense of claim on the part of the complainant under the lease. The only question, therefore, which remains for consideration relates to the cows; upon which Carpenter claims a specific lien, by virtue of the contract which is supposed to be created by the provisions of the lease relative to the cows and sheep.

If the lease had contained a stipulation that the same stock put upon the farm by Fowler should be returned at the expiration of the term, there could have been no doubt as to the complainant's equitable right to restrain the defendant Spencer from selling or otherwise disposing of the eight cows which are a part of those leased to him, or any other cows, now on the farm, purchased with the proceeds of the original cows which had been sold by the lessee without authority. I infer from the terms of the lease, however, that it was not contemplated by the parties to that instrument that the same cows which were leased with the farm should be returned at the end of the five years; but that the lessee should return to his landlord, at the end of the term, thirty cows of the same age, and equal in value to those which were received at the commencement of the term. If such was the intent and meaning of the contract, I do not see how this case can be distinguished from that of *Hurd v. West*, 7 Cow. 752. In that case the supreme court decided that where a certain number of sheep were hired by A. to B. at a pound of wool a head per annum, and at the expiration of the time limited, B. was to return to him the same number of sheep and of as good quality, the title to the sheep did not continue in A.; but that the lessee might dispose of the sheep let, and return other sheep of the same value at the time appointed for the fulfillment of the contract on his part.

In the present case the stipulation in the lease is, to return, at the end of the five years, cows of equal age and quality; which necessarily excludes the idea that the identical cows put on by the landlord were to be returned to him at the expiration of the term. For those cows could not be of equal age, although they might possibly be of equal value, with the thirty cows when they were put on to the farm in January, 1837. Contracts of this kind were very common in Scotland previous to the commencement of the present century. Lessors of real estate there, the better to enable their tenants to cultivate and carry on the farms leased to them for a term of years, were in

the habit of delivering to the tenant, at the commencement of the term, grain for seed, cattle to stock the farm, and implements of husbandry; under a stipulation in the lease that the like property, in quantity and quality, should be returned by the tenant at the expiration of the lease. And the property thus let with the farm was in the language of the country called steelbow goods: See 2 Bell's Law Dict., art. Steelbow Goods; Ersk. Inst., b. 2, tit. 6, sec. 12. In relation to goods thus let with the farm, it has been held that whether they be grain which is necessarily consumed in the using, or cattle or implements of husbandry which are not usually considered as fungibles, they are the goods of the tenant, and may be attached and sold for the payment of his debts: *Trumbull v. Ker*,¹ Morrison's Dict. of Decis. 14, 777. And Lord Stair, in speaking of contracts of *mutuum*, that is, the delivery of property to be restored in the same kind and quality, but not in the same property specifically, says: "I have no doubt but oxen, kine, and sheep are mutuable; as is ordinary in steelbow goods, which are delivered to the tenant of the land for the like number and kind at his removal:" Stair's Inst., b. 1, tit. 11, sec. 4.

It is unquestionably competent for the landlord, in cases of this description, to make a contract which will secure to him an equitable lien upon the property put upon the farm for the use of the tenant, or on the proceeds thereof so far as the same can be traced and identified. The case of *Butler v. McVicar*, referred to in Bell's Illustrations of the Law of Scotland, may have been decided upon the ground of such a stipulation in the lease; though in one report of the case, the court appears to have based its decision upon the ground of a tacit hypothec of all the tenant's property on the farm for the rent of the current year, and that the steelbow goods were to be considered as a part of the rent of the farm for the last year of the term, when they were to be restored: 3 Faculty Col., No. 144; 5 Bro. Sup. to Dict. of Dec. 899. In the statement of that case by Morrison, it appears that the landlord had inserted a special stipulation in the lease that if the tenant should be distressed by legal diligence, or his means or effects in any way endangered so as to prevent him from being in a situation to perform the conditions of the lease, the landlord might seize upon the steelbow goods *brevi manu*, and apply the same to his own use, for extinction of all claims and demands. Under this clause of the lease, the tenant having died bankrupt, the landlord unques-

1. *Turnbull v. Ker*.

tionably had the right to take the goods into his possession for the security of his debt; and was therefore entitled to a preference over the pursuers who claimed as creditors of the estate of the tenant: See Mor. Dict. of Decis. 6209.¹

Without any stipulation on the subject, it is impossible to discover upon what principle the complainant, in the present case, can claim the right to the cows which have been purchased by the tenant with his own funds, or the hay and farming tools and dairy utensils on the farm, in which the landlord never had any right or interest; so as to deprive the creditor of Spencer of the right to levy on such property for the satisfaction of his debt. As to the eight cows remaining of those which were put on to the farm at the commencement of the term, and those which have been bought with the avails of cows or sheep which have since been sold by the tenant, there might have been some room for resisting the claim of the creditor to a preference, by virtue of his execution, if the term had expired before the property was levied on; so as to have entitled the complainant to an immediate return of the cows and sheep mentioned in the lease, according to the stipulation therein contained. But applying the well-established principles of law to the written contract between the landlord and his tenant, in this case, I am bound to decide that the legal title to the cows and sheep put on to the farm at the commencement of the term passed to the tenant, so as to give him the right to dispose of them, and to subject them to seizure and sale for his debts. By the lease the landlord has not secured to himself any legal or equitable lien upon those cows and sheep, or upon others that may be brought on to the farm by the tenant, but which shall not belong to him at the expiration of the lease. And he has only the right to compel Spencer, at the end of the term, to restore to him an equal number of cows and sheep of the same ages as those leased with the farm at the time the tenancy commenced, and of the same value.

The injunction must therefore be dissolved as to both defendants. The denial in the answer of Griffin is as strong as the allegations in the bill, both being founded on information and belief merely.

APPROVED AND FOLLOWED in *Reed v. Abbey*, 2 N. Y. Sup. Ct. 381, a very similar case, in which it was held, that where sheep were delivered in July,

1. *Butler v. McVickar*.

1869, to be returned in September, 1871, "in as good condition and age as when taken," the transaction was a sale, and not a bailment. See the note to *Smith v. Olark*, 34 Am. Dec. 215. See also *Jenkins v. Eichelberger*, 28 Id. 691.

WHELPLEY v. VAN EPPS.

[9 PAIGE'S CHANCERY, 332.]

JURAT TO ANSWER IN FORM OF CERTIFICATE by the officer, that the defendant swore that the "facts," instead of the "matters," stated in the answer "were true," instead of "are true," is sufficient.

MOTION to strike defendant's answer from the files on account of an imperfection in the jurat.

H. C. Whelpley, for the complainant.

Cyrus Stevens, for the defendant.

By **WALWORTH**, Chancellor. Two objections are made to the form of the jurat in this case: 1. That the defendant swears that the facts were true, in the past tense; and, 2. That he merely swore that the facts stated, in the answer, and not the matters therein stated were true. The jurat is in the usual and proper form, so far as relates to the matter of the first objection. It is not in the form of an affidavit in the present tense; but is a certificate of the officer, stating what the defendant had sworn to. And it is properly in the past tense, certifying that the defendant appeared before him at the time therein specified, and swore that the facts stated in the answer were true; that is, that they were then true.

The second objection is equally untenable. Although the officer, by inadvertence in administering the oath, or by mistake in drawing up the jurat to the answer, has substituted facts for matters, which latter is the word used in the eighteenth rule, prescribing the manner in which bills, answers, and petitions shall be verified upon oath, the jurat is sufficient. The rule merely specifies the substance of the oath to be administered to the party, and not the precise words which are to be used. And there can not be a doubt, in this case, that if any allegation in this answer was known by the defendant to be false, at the time he swore to the same, he might be convicted of perjury, upon proof of such knowledge. The word facts, as stated in this jurat, means the same thing as matters; that is, the matters in the answers which are therein stated as facts.

The motion must therefore be denied, with eight dollars costs.

And the complainant is to have the same time to file his replication to the answer, after the entry of the order upon this decision, as he had when the motion was made.

Order accordingly.

VERIFICATION OF A PLEADING need not be in the exact words of the statute, a substantial compliance being sufficient: *Bowghen v. Nolan*, 53 How. Pr. 486, citing the principal case. It is cited also in *Schoolcraft v. Thompson*, 7 Id. 449, on the point as to whether or not a verification of a confession of judgment to the effect that "the facts" stated therein "are true" is sufficient to cover the entire contents of the statement. But the point is not decided.

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CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

BLYTHE v. LOVINGGOOD.

[2 IREDELL'S LAW, 20.]

PROMISSORY NOTE GIVEN IN CONSIDERATION THAT A PARTY WILL WITHDRAW BID made on a sale of public lands is fraudulent and void.

APPEAL from superior court of Cherokee county. One of the conditions at a sale of public lands was that the highest bidder should give a bond before the middle of the day succeeding the sale, or otherwise the next highest bidder could take the land. Plaintiff was the highest bidder for a certain tract, and defendant, the next highest bidder, gave him a note for one hundred dollars, in consideration of his failing to comply with the condition of the sale. Plaintiff did not comply with the condition of the sale and brought this suit upon the note. The defendant contended that the note was void, the consideration being fraudulent, but the court instructed the jury that the consideration was sufficient. Verdict for plaintiff. Defendant appealed.

Francis, for the defendant.

Bynum, contra.

DANIEL, J. If the plaintiff intended to comply with the terms of the sale, but failed in consideration of the defendant's executing to him the note, then the conspiracy had the effect of depriving the state of so much of the purchase money as made up the difference between the two bids; and such a transaction, we think, was fraudulent towards the state. The plaintiff's counsel contends, that, if the parties intended to de-

fraud the state, it could be taken advantage of by the state only, and not by the defendant, who has reaped the benefit, and was a *particeps criminis* in the transaction. We are of a different opinion. The law prohibits every thing which is *contra bonos mores*, and, therefore, no contract, which originates in an act contrary to the true principles of morality, can be made the subject of complaint in the courts of justice. It has been repeatedly decided in England, that the vendor of goods could not recover the price of the vendee, when he had aided the vendee, either in packing or otherwise, to defraud the revenue laws of that country: *Clugas v. Penabena*,¹ 4 T. R. 466; *Waywell v. Reed*,² 5 T. R. 599. So a contract, which is a fraud on a third person, may, on that account, be void as to the parties to it, as where A. succeeded B. in a house, and, not being able to pay for the furniture, proposed to D., his friend, to advance money for him, who accordingly treated with B., and agreed to purchase the furniture for A. at seventy pounds, which sum he paid B.; but there was a private agreement between A. and B. that A. should pay a further sum of thirty pounds, over and above the seventy pounds; and, in pursuance thereof, A. gave B. two promissory notes of fifteen pounds each, for that sum: Held, that he could not recover on the notes, as the private agreement was a fraud upon D., who had advanced the seventy pounds in confidence that it was the whole consideration: *Jackson v. Duchaire*, 3 T. R. 551. So where a surety gave a guaranty to A. for a certain amount of goods to be sold to B., and the latter agreed to pay ten shillings per ton beyond the market price, in liquidation of an old debt due to A., without communicating the bargain to the surety; held, that it was a fraud upon the latter, and the guaranty was void: *Pidcock v. Bishop*, 10 Eng. Com. L. 197.³ Lord Mansfield said, in *Holman v. Johnston*, Cowp. 343, “the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounded at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is even allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man, who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the action appears to arise *ex turpi causa*, or the transgression of a positive law of the

1. *Clugas v. Penabena*.2. *Waywell v. Reed*.

3. 10 Eng. Com. L. 276; 3 B. & C. 605.

country, then the court says he has no right to be assisted. It is upon this ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." We are of the opinion that the agreement in this case was in pursuance of a fraudulent design to deprive the state of a fair price for its land, and that the plaintiff ought not to recover. There must be a new trial.

By COURT. New trial awarded.

CONTRACTS DESIGNED TO DEFRAUD THE GOVERNMENT ARE ILLEGAL, and actions based thereon can not succeed in any court of justice: *Rogers v. Waller*, 9 Am. Dec. 758; *Gulick v. Ward*, 18 Id. 389.

SAUNDERS v. HATTERMAN.

[2 FREDELL'S LAW, 82.]

DECEIT WILL NOT LIE FOR FALSE REPRESENTATIONS where the plaintiff by reasonable diligence could have informed himself of the truth of the matter.

WHERE VENDOR MISREPRESENTS VALUE OF LAND lying in a neighboring county, the vendee can not maintain an action for deceit though he has never seen the land, as he has it in his power to ascertain its value.

APPEAL from the superior court of Cabarrus county. The opinion states the case.

Boyden, for the plaintiff.

Barringer, contra.

DANIEL, J. The defendant (in the county of Cabarrus) sold to the plaintiff a tract of land, lying in the neighboring county of Davie, which land the plaintiff had never seen. At the time of the contract and at the time of the execution of the deed, the defendant said that the land was worth about three dollars per acre—that it had sold for five or six hundred dollars, and that it was good land. It was alleged by the plaintiff that those assertions were all false, and known to be false by the defendant when he made them. The judge informed the jury that an action of deceit would not lie, admitting that the representations were false and fraudulent, if it was the plaintiff's own fault not to have informed himself of the truth of the matter, if by reasonable diligence he could have done so; that if he could have informed himself, as to the value of the land, by going upon it and there making an examination for himself, or if he could, by making inquiries, have ascertained for what

amount it sold (as he might have done in this case), he could not maintain the action, though the affirmation were false; that if he could have ascertained the truth by reasonable diligence, it was his own folly to trust to the representations of the vendor. We do not see any error in this charge of the court. The true rule is stated to be, that the seller is liable to an action of deceit, if he misrepresent the quality of the thing sold, in some particulars in which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made: 2 Kent's Com. 487. The misrepresentation must be of a kind, the falsehood of which was not readily open to the other party: *Per* Taylor, C. J., *Fagan v. Newson*, 1 Dev. 22. The cases have gone so far as to hold, that if the seller should ever falsely affirm, that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself from proper sources of the value, and it was his own folly to repose on such assertions, made by a person whose interest might so readily prompt him to invest the property with exaggerated value: 2 Kent's Com. 486, 3d ed.; 1 Roll. Abr. 101; *Leakins v. Clissel*, 1 Sid. 146; 1 Lev. 102; *Lysney v. Selby*, 2 Ld. Raym. 1118. If the false representation had been made of the rent, then it seems that it would sustain the action: 2 Kent's Com. 487, 8d ed., in note, where all the authorities are collected. In this case the plaintiff might have had equal knowledge with the defendant of the value of the land, if he had used reasonable diligence.

We think that the judgment must be affirmed.

By COURT. Judgment affirmed.

DECEIT LIES FOR FALSE REPRESENTATIONS IN SALE OF LAND as respects the quality of the land: *Journey v. Hunt*, 1 Am. Dec. 202; but see *Gimblin v. Harrison*, 2 Id. 720; or as to the title: *Bostwick v. Lewis*, 2 Id. 73 and note; *Culver v. Avery*, 22 Id. 586; or as to the privileges annexed to the land: *Monell v. Colden*, 7 Id. 390; or as to the incumbrances: *Bacon v. Bronson*, 11 Id. 449; or as to its value: *Bean v. Herrick*, 28 Id. 176. The principal case was approved in *Lytle v. Bird*, 3 Jones' Law, 224; and *Walsh v. Hall*, 66 N. C. 242. It was cited to the point that the law does not give an action against a vendor for a false affirmation as to the value of the thing sold, in *Setzar v. Wilson*, 4 Ired. Law, 513, and regarded as authority for the position that a purchaser is not entitled to an action of deceit if he may readily inform himself of the truth of the facts represented, in *Capehart v. Mhoon*, 5 Jones' Eq. 182; *Etheridge v. Vernoy*, 70 N. C. 724.

NEWSOM v. ANDERSON.

[2 IDELL'S LAW, 42.]

TRESPASS LIES WHETHER INJURY IS WILLFUL OR NOT, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; thus, where defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass.

TRESPASS *quare clausum fregit*. The defendant was cutting trees on his own land, when one of them accidentally fell on the land of the plaintiff. The defendant did not act designedly or negligently, and it did not appear that there was any actual injury to the land. The plaintiff's counsel moved the court to instruct the jury that this constituted a trespass on the part of the defendant. The court refused. The instruction given sufficiently appears from the opinion. Verdict and judgment for defendant. Plaintiff appealed.

J. T. Morehead, for the plaintiff.

No counsel appeared for the defendant in this court.

DANIEL, J. To sustain trespass, the injury must in general be immediate, and committed with force, either actual or implied. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured thereby, it is the subject of an action of trespass *vi et armis*, by all the cases, both ancient and modern, and it is immaterial whether the injury be willful or not: *Leame v. Bray*, 3 East, 599; 2 Leigh's N. P. 1402. We think that the charge of the judge was incorrect, when he said, "that the plaintiff could not recover, unless the tree was designedly or carelessly felled by the defendant, so as to fall on the plaintiff's land, or that, by falling on the plaintiff's land, it had fallen on his grass or vegetable growth of some kind." The ground of the action, *quare clausum fregit*, is the injury to the possession: 3 Bl. Com. 210; 1 T. R. 480;¹ and that whether the injury extends to the plaintiff's land in the mineral or vegetable kingdom. Is not the felling of trees on a person's land, and incumbering it with rubbish, an injury to the possession? We think it is. Where a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran from the pile against the wall, it was held that the

1. *Smith v. Miles*.

master was liable in trespass: *Gregory v. Piper*, 17 Eng. Com. L. 454.¹

We are of the opinion that there must be a new trial.

By Court. New trial awarded.

TRESPASS LIES WHERE INJURY IS NOT WILLFUL, but is the result of negligence: *Percival v. Hickey*, 9 Am. Dec. 210; or is the immediate or natural consequence of the act: *Guille v. Swan*, 10 Id. 234. And it is no justification that a trespass was committed under a mistake.

1. 17 Eng. Com. L. 206; 9 B. & C. 591.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WADE v. PETTIBONE.

[11 OHIO, 57.]

WHERE THE JUDGMENT CREDITOR'S ATTORNEY PURCHASES AT THE EXECUTION SALE, the purchase will, at the creditor's election, be deemed to have been made for his benefit; but this election must be exercised within a reasonable time; twenty-five months is too long a time to wait.

BILL in chancery, by which complainant, the agent of the Miami exporting company, seeks to hold the defendant as trustee for such company of certain lands purchased at execution sale by the defendant, the then attorney for the complainant, the plaintiff in the action in which the execution issued. Although the defendant, after the purchase, recognized the company's right to the benefit of the purchase, yet more than two years elapsed without their taking advantage thereof, during which time the master's costs were settled by the defendant.

Powell, for the plaintiff.

Finch, *contra*.

By Court, **LANE, C. J.** The ground, upon which the defendant claims the right to withdraw his offer to relinquish his title to the land, is because, he says, that offer was made to the company, but that he has discovered Wade claims the title, as his own, and not for the benefit of the company. Much of the argument is devoted to the examination of the proofs bearing on this point. It will be unnecessary for us to notice this, because, in our opinion, the case will be decided upon principles, among which, this loses its character and importance.

Pursuing the facts, in the order of their occurrence, the first

proposition to be considered, is, whether the attorney or solicitor can purchase, at a sale under the execution, which his client is seeking to enforce; as, between him and the debtor, as between him and third persons, such sale is without objection; but it is another question, between him and his client, when the law creates confidential relations. The attorney is retained for the purpose of doing all in his power, to advance the client's interests, and, especially, that the property should produce enough, by sale, to pay the whole debt. For this purpose, although not the agent of the law, in making sales, he has a large control, as to the management of the execution. Without adverting to other means of influence, he can select his time to set the machinery of the law in motion, and he can countermand or postpone it, for the purpose of obtaining, for his client, a better price. But, if he were permitted to purchase, it would be his interest to buy at the least price; his personal interest, therefore, would be adverse to that of his client, especially if the property did not produce enough to pay the whole debt. He would be enabled to gain, by sacrificing his client's interest, and the lower the price, the greater would be his advantage, and the greater his client's loss. To prevent this collision of interests—to destroy the temptation of abusing opportunities, for obtaining personal advantages, at the expense of confidential obligations, by sacrificing interests which he is bound to protect—the law imposes upon those who stand in fiduciary relations, the disability of acquiring interests inconsistent with such relation. It does not inquire whether the act was honest or advantageous; but gives the protected party all advantage of the act done. This doctrine is universally applicable to trustees, executors, agents; and it nowhere is of more forcible application, than to an attorney, purchasing under an execution, where the whole debt is not paid: 8 Ohio, 552;¹ 9 Id. 117; 5 Watts, 303.²

The case, then, is one in which, although Pettibone acted in entire good faith, his client may step in, and claim the benefit of his purchase, unless it was made with their assent. He claims that assent may be inferred, after they did not answer the letter in which he communicated information about the sale, and asked their instructions. We do not intend to determine whether such assent can be presumed from this omission. And it is of no consequence, in the present case, because, by his letter of the twenty-ninth of November, he cheerfully relin-

1. *Armstrong v. Huston*.2. *Leisenring v. Black*; S. C., 30 Am. Dec. 322.

quished all benefit of the purchase, to the company. This act was a recognition of his confidential relations; and it authorized the company, or Wade, their trustee (whom, on this examination, we, at present, regard as identical with the company), to demand of Pettibone, to hold his rights for their benefit, and to be substituted in his place. Negotiations were then opened between the parties for the sale of the land, which continued until April, 1837, when Wade signified his intention to be in Delaware, to mature the arrangement during the ensuing month. Up to this time, the rights of the parties were clear; and had an application been then made, we should have found no difficulty of entertaining a suit, to give the title to the plaintiff.

But, before Wade or the company could claim the benefit of this purchase, it is plain they must absolve Pettibone from his responsibilities, and pay the expenses of acquiring the title. Pettibone had a claim for his own fees. He was responsible to the master, for the expenses of the sale, and he stood liable to the master for the immediate adjustment of the purchase money; for, although Wade might elect to assume the purchase, it is not clear that Pettibone could, even then, compel them to take it, and certainly not, without litigation, in which the master ought not to be involved. In this stage of the case, Pettibone had a right to expect from the plaintiff, an early close of the affair.

Instead of this, not a step was taken or a movement made towards the completion of the purchase, from April, 1837, to June, 1839. During this period of twenty-five months no effort was made either to pay to Pettibone his just claim, or to release him from his responsibilities to the master. And if we may trust the answer, when, in the spring of 1839, the master had exacted from Pettibone security for the prompt payment of the purchase money, and when Pettibone visited Cincinnati, in June, 1839, on this errand, but the plaintiff could not be found. He therefore paid the money over to the company.

The phase, therefore, which the case assumes, is not as to the existence of the original right, but whether it has not been lost by delay. This long slumber—this unaccountable and inexcusable neglect of duties—seems, to the court, a sufficient answer to a plaintiff who is seeking, in chancery, to assert rights.

Bill dismissed.

ATTORNEY PURCHASING AT EXECUTION SALE.—Where an attorney purchases, in his own name, for one of two execution plaintiffs, the purchase

will inure to the benefit of both plaintiffs: *Leisenring v. Black*, 30 Am. Dec. 322. That the attorney can not bind his client by a purchase at the execution sale merely by virtue of his general authority, see *Beardsley v. Root*, 6 Id. 386.

DAVIDSON v. ROOT.

[11 OHIO, 98.]

THE LIEN OF A JUDGMENT IS NOT LOST by the division of the county, so that land affected by the lien falls without the old county, in the absence of legislation taking away the lien.

BILL in chancery. The opinion states the case.

By Court, Wood, J. This is a bill in chancery, filed by the vendor, against the vendee, to compel the specific execution of a contract, by him, for the purchase of one undivided third part of two acres of land, in the township of Portland, in the county of Erie, with the improvements thereon. This contract was executed between the parties on the second day of June, 1838; and, by its terms, the consideration agreed to be paid was two thousand five hundred dollars; one thousand dollars was paid in hand; five hundred dollars was agreed to be paid on the sixth of July, 1838; five hundred dollars on the sixth of July, 1839; and two hundred and fifty dollars on the sixth of July, 1840; the deferred payments bearing interest. The two last installments of seven hundred and fifty dollars, with the interest thereon, remain unpaid.

The respondent, in his answer, admits these facts, and avers his readiness to comply with the terms of the contract, provided he can do it with safety to his own interest; but insists upon the inability of the complainant to make him a good title, on completing the payments; and the doubt arises under the following circumstances: At the December term of the court of common pleas of Huron county, 1837, six months before the date of the contract, Festus Clark recovered judgment against the complainant and others, for over two thousand dollars. At the date of this judgment, the land was embraced within the territorial limits of Huron county. Davidson, and others, then filed their bill in chancery, praying for relief against this judgment. Such proceedings were had, that this suit in chancery was appealed to the supreme court, and, at the August term, 1840, one thousand one hundred and fifty-six dollars and seventy-seven cents of the judgment of Clark against the complainant and others, was perpetually enjoined; and the injunc-

tion of the common pleas, as to the residue, dissolved, and leaving, therefore, Clark's judgment, to the amount of nine hundred and forty-four dollars and twenty-six cents, in full force, against the complainant.

In March, 1838, the county of Erie was erected and organized, embracing a part of the territory which before belonged to Huron county, and in which the land in controversy is situated. The only reservation of rights, in suits pending, etc., in this act organizing the county of Erie, is in reference to proceedings before justices of the peace; while the higher judicial tribunals seem to have been entirely overlooked, or their proceedings regarded as entirely unworthy of consideration by the legislature. No execution has ever issued on Clark's judgment; and being a lien upon the lot in question, at its rendition, in December, 1837, the question arises whether it still continues a subsisting lien, and, unless extinguished, prevents the complainant from conveying an unincumbered fee to the respondent.

The second section of the act entitled "an act regulating judgments and executions," provides "that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered, in all cases where such land lies within the county where the judgment is entered; and all other lands as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." Judgment liens are of a purely legal character. They do not exist at common law. Their creation, extension, and continuance, depend entirely upon statutory provision. Their operation, as a part of the remedy to enforce the collection of a debt, is governed by the terms of the statute. That the lien may attach, it is certain, that, by the statute, the land must be in the county where the judgment is rendered, at the time of its rendition; or, if in another county, there must be an actual levy. And it is, therefore, supposed that when a new county is organized, with no saving clause in the act, and land subject to a judgment lien, in the old county, falls within the new organization, the lien ceases to exist. We do not think so. The lien being given by express provision, although it is admitted as a part of the remedy, to be within the control of the legislature, must, nevertheless, remain until lost by the act of the judgment creditor, or taken away by subsequent legislation. There is nothing, express or implied, in the act of 1838, organizing Erie county, inconsistent with the existence or enforcement of this lien. It may be said that, after

the division of the counties, the records of Erie furnish no notice of this incumbrance to the purchaser. This is true; nor would they furnish such notice, had there been ever so extensive a saving clause in the act. There is no difference, in our opinion, in principle, between this judgment lien, and a lien created by mortgage, recorded in Huron county before the division. The record of Erie would have given no notice of the fact at the date of this purchase by the respondent. The law requires all instruments by which lands are incumbered to be recorded in the county where the land lies; but it has never been supposed that liens, created by such instruments, became inoperative, because the land incumbered by a subsequent division, fell into a different county than that in which such instruments were recorded. Nor has a new record, in such case, been considered necessary to protect the grantee against subsequent purchasers without notice. The analogy between the two cases is complete.

The case of *The People v. Morrell*, 21 Wend. 575, is relied upon by the complainant as an authority that Clark's judgment lien was lost with the division of the county. If there is any analogy between the cases, it is very remote; so much so, as not to be seen by us. In that case, the court held the division of a county ejected from office an associate judge of the court of common pleas, who fell within the new division; that his residence was changed by the operation of the law, and that the law required a continued residence in the old county as a qualification to hold and enjoy the office.

In the case at bar the law requires the land to lie in the county at the rendition of the judgment, that the lien may attach, but not that it shall continue in the same county that the lien may be preserved. If, in this case, the amount due from the respondent to Davidson was sufficient to liquidate Clark's judgment, there would be no difficulty in decreeing a specific execution of the contract, and protecting, fully, the respondent's rights, by his seeing to the application of the money due the complainant to Clark's judgment; but such is not the fact. The difference is nearly three hundred dollars; and until this judgment lien is removed by the complainant, the respondent should not be required to further execute the contract on his part, by paying the balance of the consideration.

Bill dismissed without prejudice.

A similar question arose in California. The supreme court there quote from the reasoning of this decision, and enforce its conclusion in the follow-

ing language: "We have quoted at length from the opinion in this case, because it is the only case in point to which we have been referred, and because the reasons presented are well stated and entirely conclusive:" *Bowman v. Hovious*, 17 Cal. 471, 476.

PUGH v. CHESSELDINE.

[11 Ohio, 109.]

MISTAKE BY AUCTIONEER IN ENTERING THE VENDOR'S NAME, will be corrected in equity.

WHERE THE VENDEE WAIVES HIS RIGHT TO ABANDON A CONTRACT for the sale of land, he will be compelled to perform it.

A QUITCLAIM DEED IS PERFORMANCE OF CONTRACT TO GIVE GOOD TITLE, if the vendor had the title.

BILL to specifically enforce performance of contract to purchase a tract of land. The sale was at public auction. It appeared that the auctioneer made a mistake in entering the name of the vendor. The case sufficiently appears from the opinion.

Charles Fox, for the plaintiff.

Edward Woodruff, contra.

By Court, WOOD, J. There has been a mass of testimony taken in this case, too voluminous to be recapitulated at length, and will only be referred to in general terms, in the disposition of the case. In this class of cases, it is well settled, that the auctioneer is the agent of both parties, and that sales of this description must be conducted in the utmost good faith; and the bidder, as a general rule, has the right to rely on the printed conditions, or verbal representations made by the auctioneer; and if they are not, substantially, true, it is a fraud upon the purchaser, and he is not bound by his bid. It is, also, true, that a court of equity looks beyond the letter, and inquires after the intentions of the parties. Charles Shultz was, at one time, the owner of this property, and had assigned it to the complainants, for the benefit of his creditors. At the time of this sale, and before, and after, he purchased, Chesseldine occupied it under a lease from the complainants, as assignees, and paid the rents, occasionally, to Charles Shultz. He must, therefore, have known to whom it belonged, and that Charles Shultz was acting as the agent of the complainants in the management of the premises; and looking, then, at the transaction in its real light, equity would regard the contract as between the complainants and defendant, notwithstanding the auctioneer erroneously made Charles Shultz a party. The correction of mistakes

is one of the peculiar jurisdictions of a court of equity. It appears to us, also, the memorandum of the sale, signed by the defendant, through the agency of the auctioneer, if we regard the complainants as the real parties, takes the case out of the operation of the statute of frauds.

It is certain the property was incumbered at the time of the sale, by the mortgages referred to, and until the July term of the superior court, succeeding; and that a suit was pending in favor of certain creditors of Charles Shultz, against the complainants, as his assignees, to set aside the assignment of this property; but, at the July term, by consent of the Bank of the United States, the creditors and assignees, such proceedings were had that the title was confirmed in the assignees, and the avails of the property disposed of by the decree, leaving it perfectly in the power of the assignees to make a good title. It is very clear, if Chesseldine had chosen to abandon the purchase, at any time after the ten days had elapsed, in which the title was to be made, his right to do so could not have been questioned. But if he chose, on his part, to consider the contract open, and to waive the limitation, within which the complainants were to convey, and until it was in their power, equity will estop him from afterwards setting up their default as a defense to the suit.

If he treated the bargain as open and subsisting, until the bill was filed, and the complainants were able to make a good title at the hearing, performance, on the part of the defendant, will be decreed: 2 P. Wms. 630;¹ 1 Atk. 12;² 3 Cow. 445, 555.³ It is, also, certain, if the printed conditions of the sale, or the representations made, are not true, the purchaser may waive his right to abandon the contract, and he will, in that event, be compelled to perform it. Does not the defendant occupy this ground? Griffin Taylor swears that the defendant offered to sell him the property three or four weeks after the purchase. Fox says, before he commenced this suit, which was on the twenty-fifth of November, 1839, he had several conversations with Chesseldine. He, at first, expressed a willingness to take the property; but, at last, objected to the title, and in October, or early in November, deponent tendered him the deed of the complainants. It is proved, by Mr. Chase, that in June or July the defendant agreed to pay for one half of a partition wall, to separate the premises in controversy from those of the deponent, in the event of his completing the purchase. There are other

1. *Langford v. Pitt*. 2. *Gibson v. Patterson*. 3. *Seymour v. De Lancy*, 3 Cow. 445, 537.

facts, also, in proof, which, altogether, lead us to the conclusion that the defendant intended to take the property, until about the time when the deed was tendered, in October or November, long after the title was complete in the assignees; and the cause of his refusal was then, probably, not so much from any objection to the title, as the depreciation in the value of real estate, which is shown to have been at least twenty-five per cent., from May till October, 1839.

Another ground of defense is, that the complainants' deed was but a quitclaim, which the defendant was not obliged to receive. Whether this was a compliance with the contract, on the part of the complainants, must depend on its terms. The contract was for a good title. If, then, the assignees had the title, it would pass to the defendant by a quitclaim, as well as by a conveyance with covenants of warranty. The form of the conveyance, under such a contract, can not be material. The court will look to see if a good title is conveyed, and if not, whatever may be the form, the vendee will not be decreed to execute the contract on his part. This deed, however, does contain covenants of warranty, by the assignees, against their own acts; but without even these covenants, a majority of the court would consider this conveyance sufficient to satisfy the terms of the sale.

Decree for complainants.

AUCTIONEER'S POWER TO SIGN MEMORANDUM: See *Singstack v. Harding*, 7 Am. Dec. 769; *Davis v. Robertson*, 12 Id. 611; *Meadows v. Meadows*, 15 Id. 645; *Episcopal Church v. Wiley*, 30 Id. 386; *Smith v. Jones*, Id. 498, and the references in the notes to the decisions; and *Davis v. Rowell*, 13 Id. 398-400, in note.

CONTRACTS TO GIVE GOOD AND VALID DEED: *Stow v. Stevens*, 29 Am. Dec. 139; *Tinney v. Ashley*, 26 Id. 620; and *Porter v. Noyes*, 11 Id. 34, in the note whereto the subject is examined at length.

Followed, in regard to the correction of mistakes, in *McConnell v. Brillhart*, 17 Ill. 361.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ALLSHOUSE v. RAMSAY

[6 WHARTON, 331.]

CONFLICT OF LAWS.—**VALIDITY OF A CONTRACT** is to be determined by the law of the place where it was executed, and in the absence of an express or necessary understanding that the contract is to be elsewhere performed, the place of performance is presumed to be the place of execution.

DEBTOR IS NOT BOUND TO TENDER PERFORMANCE WITHOUT THE STATE where there is no stipulation in regard to the place of performance.

A PROMISE TO PAY A JUDGMENT AGAINST ANOTHER if the creditor would extend a certain forbearance to the debtor, is within the statute of frauds, and must be in writing.

APPEAL from a decision of a justice of the peace in an action brought by Ramsay against Allshouse. Ramsay had recovered a judgment against one Vannata in New Jersey, where the parties then lived. The defendant Allshouse promised Ramsay that he, Allshouse, would pay the judgment if Ramsay would wait three months. At the expiration of that time Ramsay, who had moved to Pennsylvania in the mean while, demanded payment of Allshouse, and the demand not being complied with, brought this action. The lower court gave judgment for the plaintiff.

Maxwell, for the plaintiff in error.

A. E. Browne, contra.

By Court, GIBSON, C. J. There are discrepant texts of the civil law touching the question whether a foreign contract is subject to the law of the place where it was made, or the law of the place where it is to be executed; and the commentators by no means agree in their attempts to reconcile them. The common

law rule is, that the validity of a contract is to be determined by the law at the place of its origin; and those cases which have sometimes been made the basis of another rule, are to be viewed rather as exceptions. Such undoubtedly is the case of a contract which is to be executed in a foreign country, and which is presumed to be framed on the basis of the law at the place of execution: 2 Kent, 459; Story's Conf., c. 8, sec. 260. But taking the *locus contractus* in such a case, to be the place of performance, still a presumption arises that the contract is intended to be performed where it is made, if there be not an express or necessary understanding that it is to be performed elsewhere; and whenever such understanding is not apparent, the law of the contract is the law of the place where it was made: 3 Burge's Conf. 758; 2 Id., 851. Such are the principles applicable to the subject, as they have been stated by the best British and American jurists; and what is there in the case before us to indicate the existence of an understanding that the contract was to be executed in Pennsylvania? The promise was made in New Jersey, where all the parties but the creditor lived; and it was to pay the debt at the end of three months, without regard to place. But the creditor had shortly before removed to Pennsylvania; whence an argument that, as every one must be taken to have intended the legal consequences of his acts, the parties, in this instance, must have intended that payment should be made at the place of his domicile. But an obligation thus to pay, is not even a legal consequence of the contract. Where the place of payment is not designated, the money must be tendered wherever the creditor is to be found within the realm; but the creditor is not bound to go out of it to seek him: Co. Lit. 210 b. The rule of the civil law is narrower still, it being said that payment must be made at the place where the contract was made, unless it appear by express provision or necessary inference that another place was intended: 3 Burge's Conf. 822. As, then, there was no stipulation about place in this instance, the debtor was not bound to follow his creditor to Pennsylvania, which, as regards transactions of this nature, stands in relation to other states as a foreign country—a principle decided in *Buckner v. Finley*, 2 Pet. 587, in which the states of the union were held to be foreign countries as regards each other, in respect to bills of exchange. This contract must be left, then, to the operation of the particular clause in the New Jersey statute of frauds; and if it be such as that clause requires to be in

writing, the plaintiff will derive no advantage from the omission of such a clause in the statute of Pennsylvania.

Decisions on the British statute of frauds are received, perhaps, in all the states, as guides in the exposition of enactments on the same basis; and those of them which pertain to the interpretation of the second clause in the fourth section of that statute, are consequently applicable to the same clause in the statute of New Jersey. The rule extracted from them by Mr. Justice Buller, in *Matson v. Wharam*, 2 T. R. 80, is, "that if the person for whose use the goods are furnished, is liable at all, any other promise by a third person to pay the debt, must be in writing, otherwise it is void by the statute of frauds;" and the existence of liability on the part of him who had the benefit of the original consideration, has been the criterion in the subsequent cases. In that case, it was said that Lord Mansfield had taken a distinction in *Mawbray v. Cunningham*, which was overruled in *Jones v. Cooper*, Cowp. 227, between a promise before credit given, and a promise after it, supposing the former necessarily to be an original undertaking in all cases, and the latter to be a collateral one; the truth of which is doubted in *Roberts on Frauds*, 210. But in *Peckham v. Faria*, 3 Doug. 13; S. C., 26 Eng. Com. L. 15, Lord Mansfield himself confirmed the statement of Justice Buller, and at the same time receded from his former position. It is scarce necessary to say, that the report of that case was not published when Mr. Roberts wrote. In no case, then, since *Jones v. Cooper*, has it been doubted, that if credit be given to a third person, either a subsequent or precedent promise is a collateral one. Such is the doctrine of *Anderson v. Hayman*, 1 H. Bl. 120, and such it has continued to be down to *Darnell v. Tratt*, 2 Car. & P. 82; S. C., 12 Eng. Com. L. 36.¹ Had the courts of New Jersey adopted any other interpretation of their statute, we would be bound by it; but in *Dilks v. Parke*, 1 South. 219, and *Hoppock v. Wilson*, Id. 149, the principle of the British decisions seems to have been followed. What, then, is the case here? The defendant promised to pay a judgment against another, which is still in force. Had the promise been taken in satisfaction of it, he would have made the debt exclusively his own; but the consideration was only to forbear; and the promise was, in the words of the statute, to pay another's debt. The very case was put as an illustration by the chief justice, in *Buckmyr v. Darnall*, 2 Ld. Raym. 1085. "Where a man is indebted," said he, "and J. S.

1. 12 Eng. Com. L. 462.

in consideration that the creditor would forbear the man, promises to pay him the debt, such a promise is void, unless it be in writing." It is clear, then, that the law of New Jersey rules the case; and that the debt is irrecoverable by it.

Judgment of the court below reversed, and judgment for the defendant on the case stated.

LEX LOCI CONTRACTUS controls the validity of a contract: *Speed v. May*, 17 Pa. St. 95; *Benners v. Clemens*, 58 Id. 25; *Stringer v. Coombs*, 62 Me. 166, each citing the principal case; *Miles v. Oden*, 19 Am. Dec. 177, and note; *Baldwin v. Gray*, 16 Id. 169; *Thompson v. Ketcham*, 5 Id. 332; *Tickner v. Roberts*, 30 Id. 706; *Shaver v. White*, 8 Id. 730; *Touro v. Cassin*, 9 Id. 680; *Scoville v. Canfield*, 7 Id. 467; *King v. Harman's Heirs*, 26 Id. 485; *Malpica v. McKown*, 20 Id. 279; *Thuret v. Jenkins*, 12 Id. 508, and the notes to these various citations. The principal case is cited on the point that the parties are presumed to contract according to the laws of the place of contract: *Cox v. Adams*, 2 Ga. 166; and that a debtor is not obliged to follow a creditor out of the state to make payment: *Gill v. Bradley*, 21 Minn. 20; *Hale v. Patton*, 60 N. Y. 236.

KING v. RICHARDS.

[6 WHARTON, 418.]

A BAILER MAY DENY HIS BAILOR'S TITLE by showing that the latter obtained possession of the goods either fraudulently, tortiously, or feloniously.

TROVER by a bailor's assignee against a common carrier. The opinion states the case. Verdict directed for the plaintiffs. Writ of error.

Davis and James S. Smith, for the plaintiffs in error.

Meredith, contra.

By Court, KENNEDY, J. The only question raised in this case is, whether the defendants, the bailees of goods delivered to them as common carriers, to be transported from the city of New York to the city of Philadelphia, ought to be permitted to show, in an action brought by the bailors, or their assignees, that the bailors had no right to the goods whatever; that they had obtained the possession of them fraudulently from the true owner without his consent; and that upon demand made of the goods by the latter, the defendants below, who are the plaintiffs in error here, had delivered them to him.

In Roll. Abr. 606, tit. Detinue, it is said, if the bailee of goods deliver them to him who has the right to them, he is still notwithstanding chargeable to the bailor, who in truth has no

right; and for this 9 Hen. VI., 58, is cited. So if the bailee deliver them to the bailor in such case, he is said not to be chargeable to the true owner thereof: Id. 607, for which 7 Hen. VI., 22, is cited. And again, in Fitzherbert's N. B. 138, 139, tit. Writ of Detinue, M., it is laid down, if a man have goods delivered to him to deliver over to another, and afterwards a writ of detinue is brought against him who hath right unto the goods; now if the defendant, depending the action, deliver the goods over to whom they were bailed to him for to deliver, the same is a good bar in the action, because he hath delivered them according to the bailment made unto him. But it is said, if I deliver a deed to A., to which B. had right, and A. dies, and his executor takes the deed, he is not chargeable in detinue to me, but only to B., who hath the right, because he comes to it by law: 1 Roll. Abr. 607, tit. Detinue, for which 9 Hen. VI., 58, is quoted. The reasoning which we meet with in support of these several positions, is by no means satisfactory; nor yet in accordance, I apprehend, with analogical principles. In 1 Bac. Abr. 369, tit. Bailment (A), the reason assigned why C., to whom the goods of A. were bailed by B., must not deliver them to A., the real owner, is, that C. can not pretend to remove or alter that possession committed to him, in order to restore it to the right owner; for the right of restitution must be demanded of him that did the injury, of which C. has no pretense to judge; and therefore it would be downright treachery in him to deliver them to any other than him from whom he had it. Here the proposition that the right of restitution must be demanded of him that did the injury, because the bailee may not know or have the means of ascertaining the owner, if correct, would go to show that in no case can there be a recovery by the rightful owner of goods against him to whom they have been delivered, upon a sale, or otherwise, by one who has taken them tortiously without the owner's consent, and without the least color of right, because the vendee or bailee in such case may not know or have it in his power to ascertain with certainty who is the rightful owner of the goods. But recoveries by the right owners of goods against bailees and vendees, and especially the latter, are common and of almost daily occurrence in our courts. As against the purchasers of goods, from those who have come wrongfully by the possession of them, I do not understand it to be denied that a recovery may be had by the owners thereof; and that it is no plea for such purchasers to allege that they purchased the goods; believing the parties of whom they purchased to be the true owners

thereof, either from the circumstance of their being in the actual possession of them, or that of any other. Indeed it is well settled in England, that the sale of goods, unless made in market overt, if made without the authority of the owner, either expressly or impliedly given, does not divest him of his right of property therein; and that he is entitled to demand and recover the goods, or the value of them, from the person in possession of them, whomsoever he may be: 2 Bl. Com. 449, 450; 2 Inst. 713, 714. The law is the same in this state, with the exception that we have no market overt, and consequently no protection can be afforded upon this ground in any case to the purchaser: *Hosack v. Weaver*, 1 Yeates, 478; *Thomas v. Hess*, cited 1 Id. 479; *Handy v. Metzgar*, 2 Id. 347; *Easton v. Worthington*, 5 Serg. & R. 130; *Lecky v. McDermott*, 8 Id. 500.

Would it not, then, be singularly strange and unreasonable to hold that a bailee, a mere depositary for instance, who has given no consideration, and parted with nothing for the goods, stands in a more favored situation than an innocent vendee who has paid a full price for them? Bailees, with the exception perhaps of innkeepers, common carriers, and wharfingers, or warehouse men, have the same right to decline becoming such that vendees have, and may, therefore, by using proper precautions, make themselves secure against loss accruing from their taking charge of goods belonging to others, from whom they have been filched or improperly taken. And although innkeepers, common carriers, wharfingers, or warehouse-keepers, may be bound, the first to receive the goods in the possession of their guests, when they have room for them, and the latter the goods in the possession of those who may wish to employ them, by placing the goods in their charge, without having sufficient time allowed to make the requisite inquiry to ascertain first whether they are the rightful owners of the goods or not; yet that would not seem to furnish any sufficient ground for their refusing to deliver the goods to the owners, on demand made by the latter, where they have been wrongfully deprived of the possession of them. It is sufficient in such cases for the bailees just mentioned that they are authorized by law to retain the goods in their possession without delivery, until they are paid or tendered the amount of what they are entitled to for keeping or carrying them: *Anon.*, 2 Shaw, 161; *Yorke v. Greenough*,¹ 2 Ld. Raym. 866; and the *Case of the Exeter Carrier*, cited in *Yorke v. Greenough*, p. 857. In the

1. *Yorke v. Greenough*.

two last cases cited, the only objection made to the plaintiff's recovery was his omission or refusal to tender or pay the hire claimed by the defendant, which the plaintiff alleged he was not bound to do, inasmuch as his goods had been wrongfully taken from him and delivered to the defendant by a person who had no right thereto or authority whatever to do so. The court, however, held, in the first of these two cases, that the defendant, who was an innkeeper, had a lien upon the plaintiff's horse for his keeping, and was not bound, therefore, to deliver the horse to the plaintiff, though he was the owner, until paid for the keeping of the same; and, in the second case, that the carrier, who was the defendant, had a lien upon the goods for his carriage of them, notwithstanding they were delivered to him by one who possessed himself of them wrongfully without any right thereto, because he was bound to receive the goods, and was therefore justified in withholding them from the plaintiff, who proved himself to be the rightful owner thereof, until he was paid his freight. But in neither of these cases does it seem to have entered into the minds of the counsel or of the court that the plaintiff was not entitled to recover, because the defendant was under a promise or obligation to deliver the goods to his bailor. On the contrary, it seems to have been considered that his title to recover was quite clear, had he only, anterior to the commencement of his action, tendered to the defendant the money due for the keeping of the horse in the one case, or the sum due for the freight of the goods in the other. Besides, it is impossible not to see that in many instances, which occur almost daily, I would say, that if the right of restitution must be demanded by the owner of the goods, in such case, of him who did the injury, or, in other words, of him who wrongfully took them, his remedy to follow the wrong-doer, may cost him more than the value of the goods; or the wrong-doer, when overtaken, may be insolvent, and unable to make compensation. The owner, therefore, in every case, rather than encounter such a risk, where he has been deprived of the possession of his goods wrongfully, by one who has delivered them to a bailee, had better adopt the remedy sanctioned by the court in *Shelbury v. Scotsford*, Yelv. 23. There the owner by force and arms, and against the will of the bailee, retaken his horse, which the bailor, without any consent or authority from the owner, had lent to the bailee to ride to Y., upon his promise to return the horse on a certain day agreed on between them; and in an action brought by the bailor against the bailee, for breach of his promise, in which

the latter pleaded the true property of the horse to be in J. S., and that he *vi et armis et contra voluntatem*, had retaken the horse; the matter thus alleged in the defendant's plea was held to be a good defense; for in law it discharged the promise of the defendant by reason of the property of the horse being in J. S. This case establishes the principle clearly that the bailee can no more resist the right of the true owner to take or recover the possession of the goods than his bailor could: that the right of property is ever to be regarded, and may be inquired into in an action brought by the bailor against his bailee as well as in other cases. And hence it is that in every case almost, where it is clear that the plaintiff is not only vested with the right of property in the goods, but likewise with the right to the possession of them, the general, if not the universal rule, seems to be, when this is so, and there has been a conversion of the goods by the defendant, that the plaintiff may maintain trover for them: *Mather v. Trinity Church*, 3 Serg. & R. 512, 513 [8 Am. Dec. 663]; *Gordon v. Harper*, 7 T. R. 9. So replevin will lie in this state by the owner of goods against any one in the possession of them, who detains them without the sanction either of the owner, or the law authorizing him to do so: *Weaver v. Lawrence*, 1 Dall. 157; *Shearick v. Huber*, 6 Binn. 3; *Woods v. Nixon*, Addis. 134 [2 Am. Dec. 364]; *Stoughton v. Rappalo*, 3 Serg. & R. 562; *Stiles v. Griffith*, 3 Yeates, 82. But if the doctrine as laid down in Rolle's Abridgment, and Fitzherbert, N. B., were to prevail, neither replevin nor trover could be maintained by the owner of the goods, who was not the bailor, though he never had parted with his right of property or possession in them, against a bailee, because the latter could defeat the action at any time during its pendency by delivering the goods to the bailor, who might run away with them, so as to deprive the owner of all remedy for his loss. But it said that it would be breach of trust, or an act of treachery on the part of the bailee, to deliver the goods even on demand to the true owner, notwithstanding he has received them from a wrong-doer, because he promised to restore the goods to such wrong-doer. If the bailee in such case receive the goods from the bailor innocently, under the impression made by the bailor, that he is the owner thereof, or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, it is very obvious that such a promise ought not to be regarded as binding, because obtained through a false impression, made willfully by the bailor; and truth, which lies at the foundation of justice, as well as all moral

excellence, would seem to require, in every such case, that the goods should be delivered up to the true owner, especially if he demand the same, instead of the wrongful bailor. But if the bailee knew at the time he received the goods, and made the promise to redeliver them to the bailor, with a view to favor the bailor, that the latter had come wrongfully by them, either by having taken them tortiously or feloniously from the owner, then the bailee thereby became a participant in the fraud or felony, and it would be abhorrent to every principle of justice that he should be protected under such circumstances against the demand or claim of the owner. This promise, however, of the bailee is said to be binding on him only, and is not such as his personal representatives are bound to regard: and the reason assigned for this is because the goods have come to their possession by operation of law. This doctrine, if it were to be allowed, would certainly be singularly anomalous, and unlike, in its effect, to any other promise recognized by the law as binding.

In order to test it, let us suppose, for instance, that the vendor of goods, after having received the stipulated price for them of the vendee, promised to deliver them, but died before this could be effected; will it be pretended that his executor or administrator would not be bound, if the goods came to his possession, to deliver them to the vendee? Suppose further, that it is discovered by the executor or administrator, while he has the possession of the goods, that the vendor was not the owner of them, and that he had no right whatever to sell them; would it not be his duty to deliver them to the rightful owner, if demanded by him, and not to the vendee? No one can doubt but it would; and yet I apprehend it would puzzle a casuist himself to distinguish this latter case from that of the bailee. In either case the owner is entitled upon demand, to have his goods restored to him by whomsoever he may be that has possession of them; for *nemo debet rem suam sine facto aut defectu suo amittere*. It is also clear that the wrongful bailor, having no right of either property or possession in the goods, can transmit nothing of the kind by his delivery of the goods to his bailee. It is true there is a position laid down in Bro., tit. Trespass, pl. 256, 329, 359, which would seem to militate against this. There it is said, if A. take the goods of B. illegally, and C. afterwards take them illegally from A., B. can not maintain an action of trover against C.; for that, by the first taking, notwithstanding it was tortious, the

property of B. was divested. But it is said in 1 Sid. 431,¹ that A. does not in such case acquire any property in the goods by the first taking, and, consequently, that B. may maintain trover for them against C. This latter proposition is certainly much more agreeable to reason than the former, and ought, therefore, to be regarded as the law on the subject agreeably to the maxims, *Lex est dictamen rationis*; or *lex semper intendit quod convenit rationi*. The counsel for the defendants in error relied also upon a case mentioned by Mr. Erskine in his argument for the plaintiff in *Latouche v. Fowle*,² 3 Esp. 114, which he said was tried before Mr. Justice Gould. The defendant was a carrier, who had goods delivered to him to be carried from Maidstone to London. While the goods lay at his warehouse, a person came there who said the goods were his, and claimed them from the carrier: the carrier said he could not deliver them; but that if he was indemnified, he would keep them, and not deliver them according to order. An indemnity was given, and the goods, not being delivered according to order, the party by whom the goods were delivered to the carrier, brought an action against the carrier. And Mr. Gould, Justice, on the trial of it, would not permit the carrier to set up any question of property out of the plaintiff; and held, that he having received them from the plaintiff, was precluded from questioning his title, or showing a property in any other person. Upon this statement of the case the correctness of Judge Gould's decision may well be questioned; and it is probable that his decision was grounded upon the appearance of collusion between the carrier and the claimant of the goods as owner. And, indeed, it would appear as if Lord Kenyon did not regard it in the same aspect as stated by Mr. Erskine, or, if he did, that he has impugned it by his decision of the case in which it was cited. In the case before Lord Kenyon, the defendant was a warehouseman, to whom the goods then in question had been sent to look at, for the purpose of purchasing them; but having reason to believe that the goods were obtained fraudulently by the person who sent them, he retained them for the right owner. On the trial of the cause, Lord Kenyon permitted the defendant to prove, if he could, that the property of the goods was in other persons, and not in the party who sent them to the defendant; and said, if this were clearly proved, that he should hold it to be a decisive answer to the action. There are also other decisions and judicial *dicta* repudiating the ancient *dicta* or cases in Rolle and Fitzherbert,

1. *Wilbraham v. Snow*, 1 Sid. 438.

2. *La Clouch v. Towle*.

and the decision of Judge Gould on this subject. In *Wilson v. Anderton*, 1 Barn. & Adol. 450; S. C., 20 Eng. Com. L. 426,¹ where the captain of a ship, who had taken goods on freight, and claimed to have a lien upon them, delivered them to a bailee, the real owner demanded them of the latter, who refused to deliver them without the directions of the bailor; and it was held, upon its being shown that the bailor had no lien upon the goods, that the refusal by the bailee to deliver was sufficient evidence of the conversion. On the trial of this last case the *nisi prius* decision of Justice Gould was cited for the defendant, and it was contended in his behalf that he was only answerable to his bailor; in reference to which Lord Tenterden, C. J., observed: "If the law be as is contended, there has rarely been a sitting at Guildhall where injustice has not been done; for the title to goods has been repeatedly tried in actions against warehousemen. A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none; for the bailor can give no better than he has. The right to the property may, therefore, be tried in the action against the bailee; and a refusal like that stated in this case, has always been considered evidence of the conversion." So Littledale, J., in the same case, in answer to the argument that the relation between bailor and bailee was near like that which existed between landlord and tenant, which precluded the tenant from controverting the title of the landlord, observed that although a lessee can not dispute the title of his lessor at the time of the lease, yet he may show that the lessor's title has been put an end to; and, therefore, in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea; and a threat to destrain or bring an ejectment by a person having a good title, would be equivalent to an actual eviction; so that if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, show that the plaintiff recovered the value of the goods; or that on being threatened with an action by a person who had a good title to the goods, he had delivered them to him. The court of common pleas, also, previously to this, were clearly of opinion in *Ogle v. Atkinson*, 5 Taunt. 759, where the question was agitated and discussed, whether a warehouseman, receiving goods from a consignee, who had the actual possession of them, to be kept for his use, might, notwithstanding, refuse to redeliver them, if they were the property of another, that he might. And Mr. Justice Heath, in

1. 20 Eng. Com. L. 555.

noticing this point, remarked in reply to its having been likened to the case of a lessor in ejectment, brought by him against his lessee, to recover the possession of the leased premises, after the lease had been determined, where the lessee is not permitted to set up a right of property, as a defense, in a third person, that this principle was peculiar to the action of ejectment, that he who is intrusted with the possession of land, must deliver it back to his lessor; but the rule extends to no other action. It is, however, true that some of the members of the court, in *Miles v. Cottle*, 6 Bing. 743; S. C., 19 Eng. Com. L. 219,¹ seems to think that it is not competent to a carrier to dispute the title of a party who delivers goods to him; but the question did not arise in that case, and no reason for their thinking so is given. And it may be correct enough to hold, where the real owner of the property does not appear and assert his right to it, that the carrier or bailee shall not be permitted, of his own mere motion, to set up, as a defense against his bailor, such right for him. But it would be repugnant to every principle of honesty to say, that after the right owner has demanded the goods of the bailee, the latter shall not be permitted, in an action brought against him by the bailor for the goods, to defend against his claim, by showing, clearly and conclusively, that the plaintiff acquired the possession of the goods either fraudulently, tortiously, or feloniously, without having obtained any right thereto. It is perfectly clear, if it were to be held that he could not, it might, in effect, be securing to the bailor the enjoyment of the fruits of his iniquity, at the expense of an innocent bailee, who had made himself liable for the goods to the right owner thereof, by his having been induced to receive them from the bailor, under a false assumption by the latter, that he was the owner of them, and in not having delivered them to the owner afterwards, on his demand, through some doubt as to what he ought to do in the case, or misapprehension of what his duty required of him.

The case of *Hawes v. Watson*, Ry. & Moo. 6; S. C., 21 Eng. Com. L. 367,² which has also been cited for the defendants in error, determines nothing more than that the vendor of goods can not exercise the right of stoppage *in transitu*, notwithstanding the vendee has become insolvent, where it would prejudice third persons; such as have, according to the course and usage of trade, upon the faith of the order of the vendor, directing the goods sold to be delivered to the vendee, bought them of the vendee for a full price actually paid. The question whether the

1. 19 Eng. Com. L. 333.

2. 21 Eng. Com. L. 691.

bailee may dispute the right of his fraudulent or tortious bailor to the goods, did not arise in the case, nor does it appear to have been passed on. Neither was this question presented or decided in *Stonard v. Dunkin*, 2 Camp. 344, another case cited for the defendants in error. These cases, therefore, are inapplicable to the one before us, as the errors assigned in it present no question of any kind between vendor and vendee, so that, whether the vendor, under any circumstance, may rescind the contract for the sale, and countermand the delivery of the goods to the vendee, after he has parted with the actual possession of them, and given an order that they be forwarded to the vendee, is entirely out of the case. The only question in it is, was it competent for the plaintiffs in error, as bailees and defendants in the action on the trial, to show that the bailors of the goods to them, from whom the defendants in error claim by virtue of an assignment, to recover the value of the goods, obtained possession of them fraudulently from the right owner, without a shadow of right thereto on their part? Under the view that has been taken above of this question, and the reasons there set forth, we have been led to the conclusion, that the plaintiffs in error ought to have been permitted, if they could, to have made proof to that effect. Then, seeing the evidence rejected by the court, would, if received, have tended to prove it, we therefore think that the court erred in not receiving it. The evidence, as we conceive, was all-important for the defendants in the court below; because, if it were such as would have satisfied the jury that the assignors of the plaintiffs below had no right to the goods, but that they were the property of John B. Lasala, from whom they had fraudulently gotten the possession without his consent, it would have shown clearly that they, had they been the plaintiffs, could not have recovered from the defendants below after the goods had been claimed by Lasala, and more especially after they had been delivered up to him upon his claim. To determine otherwise would be to permit them to take advantage of and profit by their own wrong; which was practiced first upon Lasala, the owner of the goods, in obtaining possession of them from him by means of fraud; and afterwards upon the defendants below, in inducing them to take the goods from New York to Philadelphia, as if they had been the proper owners of them. If it be so, then, that the assignors of the plaintiffs below had no right to the goods, it follows inevitably that they could transfer none by their assignment to the plaintiffs below; for it is impossible in the nature of things, that a

man can transfer a right from himself which he has not. The plaintiffs below, therefore, can be in no better situation than their assignors would, had they been the plaintiffs. I do not know that it is necessary to speak of the instrument of writing signed and given by the defendants below when they received the goods. It was called a bill of lading in the argument; but it is not perhaps properly such. It contains an acknowledgment of the receipt of the goods, and an engagement to forward them from the city of New York to the city of Philadelphia, and there deliver to the order of the bailors. It can not be said to contain any admission that the bailors were the real owners of the goods; so that the doctrine of estoppel, mentioned in the course of the argument, has no application to the case. The judgment is reversed, and a *venire de novo* awarded.

Judgment reversed; and a *venire de novo* awarded.

BAILLEE SETTING UP JUS TERTII.—*Humphrey v. Reed*, 6 Whart. 443, and *Floyd v. Bovard*, 6 Watts & S. 76, cite and approve the principal case upon this point. The cases in the American Decisions involving the same question are *Stephens v. Vaughan*, 20 Am. Dec. 216; *Doty v. Hawkins*, 25 Id. 459; *Hoeller's Adm'r v. Skull*, 1 Id. 583, and note.

FRANKLIN FIRE INS. CO. v. FINDLAY.

[6 WHARTON, 483.]

UNDER AN ACT ALLOWING AN AMENDMENT "ON" THE TRIAL, plaintiff may amend his declaration during the argument.

INSCRIBERS ARE NOT DISCHARGED by the levy upon goods which are locked in the house wherein they are found by the sheriff.

COVENANT on a policy of insurance. The case appears from the opinion. Verdict and judgment for the plaintiff. Writ of error to this court.

T. I. Wharton and J. R. Ingersoll, for the plaintiff in error.

Meredith and Williams, contra.

By Court, KENNEDY, J. The first error assigned, which is an exception to the opinion of the court below, in permitting the plaintiff to amend his declaration, can not be sustained. By the act of the twenty-first of March, 1806, it is made the imperative duty of the court, either on or before the trial of the cause, to permit the plaintiff to amend any informality in his declaration, or the defendant any informality in his plea, which may affect the merits of the case. The only objection made to the

court's allowing the amendment to be made here is, that it was too late. But, according to the express terms of the act, it can not be said to be too late, if it be done at any time *on* the trial; that is, before the close of it. The amendment then, as it appears, having been permitted while the counsel were engaged in arguing the cause before the court and jury, was certainly made *on* the trial of the cause, and therefore within the time allowed by the act.

The remaining errors present but one question; and that is, whether the mere seizure of the goods by the sheriff under the execution in his hands against the assured, and closing of the window-shutters and locking of the doors of the house in which they were found, and were to be kept according to the terms of the policy of insurance, without any change of their situation or removal of them thence being made whatever, is sufficient to discharge the underwriters? That the policy was good, and covered the goods up to the time of their seizure by the sheriff, is not denied; but it is argued, that as the policy of insurance operates only in favor of the assured personally, and not on the goods, so as to accompany a transfer of the right of property in them, and as the assured must have the same interest or right in them at the time of the loss that he had at the time of obtaining the policy, the seizure of them by the sheriff, which, as it is alleged, divested the assured of the right of property in the goods as well as of the right of possession to them, released the underwriters from all obligation arising out of the policy. That the policy is not assignable, so as to follow or accompany a transfer of the right or interest, which the assured had in the goods at the time it was subscribed, may be admitted; but it can not be admitted that the assured must have, at the time of the loss, the same interest in the goods that he had at the time of procuring the policy, in order to entitle him to claim for a loss actually sustained by a peril insured against. The legal adjudications on this point show the rule to be otherwise, and that he may recover on the policy for the loss of a diminished interest: *Stetson v. Mass. Mutual Ins. Co.*, 4 Mass. 330 [3 Am Dec. 217]; *Gordon v. Mass. Mutual Ins. Co.*, 2 Pick. 249; *Reed v. Cole*, 3 Burr. 1512; *Strong v. Man. Ins. Co.*, 10 Pick. 40 [20 Am. Dec. 507].

Neither can it be admitted that the seizure of the goods in this case divested the assured of his whole and entire interest and right in the goods. He still retained the general right of property in them, notwithstanding the seizure by the sheriff. The most that the sheriff acquired thereby, was the possession

and a special or qualified right of property: *Wilbraham v. Snow*, 2 Saund. 47; S. C., 1 Sid. 438; 1 Ventr. 52; 1 Lev. 282; 1 Mod. 30; *Clerk v. Withers*, 6 Mod. 290. The right of the sheriff by virtue of the seizure is defeasible; and hence, I take it, that it is his duty to release and give up the goods to the defendant in the execution, upon a tender of the debt and damages, or damages, as the case may be, together with the costs, being made to him; so that until the goods are actually sold by the sheriff, the defendant has the right to redeem them, in order to prevent a further accumulation of costs and a loss by the sale of them for prices under their real value. The act of assembly of the twenty-second of February, 1821, regulating the fees to be received by sheriffs in such case, indicates this principle pretty clearly. But the consequence of the goods being destroyed in this case by fire after the seizure, and before a sale could be made of them by the sheriff, without any default on his part, goes to show, to demonstration, as it were, the extent of the interest which the assured still continued to have in their being preserved from such destruction, or otherwise in being indemnified under the policy for the loss occasioned thereby to him. It will not admit of a question, I apprehend, that the destruction of the goods by the fire must be his loss, unless he can obtain remuneration from the insurers upon the policy. Indeed there is no other upon whom it could possibly be made to fall, except the sheriff or the plaintiffs in the execution. As to the sheriff, it will scarcely be claimed that he is answerable, unless he failed to use ordinary diligence in taking care of and preserving the goods; for he can only be considered a bailee at most for compensation, and therefore responsible only for ordinary negligence: Story on Bail. 96, pl. 130, p. 263, pl. 398. That he was guilty of such negligence, or did not use ordinary diligence, is not pretended. And as to the plaintiffs in the execution, it must be admitted that they are innocent and free from all blame whatever. The only person therefore connected with the goods taken in execution and destroyed by the fire, that appears to have been in default, is the assured, the defendant in the execution; and he doubtless is so, because he did not long before pay to the plaintiffs the debt for which the goods were taken in execution. Hence the plaintiffs having failed, without any default on their part, or that of the sheriff, to derive any benefit or satisfaction for their debt, from the goods of their debtor having been taken in execution, it would appear to be just and reasonable that the assured should still be held liable upon the judgment against

him to pay the debt for which his goods were taken in execution. Under this view, his interest in the policy was as great at the time of the loss of the goods by fire as at any time before. Consequently he is entitled to recover upon the policy, unless from the evidence given on the trial, the jury could have found, from the seizure of the goods by the sheriff, and his conduct in regard to them, that the risk had been materially increased. We are satisfied, however, that none of the evidence given tended to prove anything of the sort, and without evidence tending to prove it, the court would have erred, had it referred such a question, as a matter of fact, to the jury, to be decided by them. From the evidence, it appears without any contradiction whatever that the goods remained precisely in the same situation after the seizure that they were in before, when it is admitted that they were covered and protected by the policy. But it is said that the sheriff, after making the seizure, fastened down the windows, closed the window-shutters, and locked the doors of the store-houses containing the goods, and having done this, took and kept the keys in his own possession. The fire, it must be observed, happened in the night, long after the usual time of closing stores and ceasing to do business in them, indeed after all the citizens had gone to bed; so that the store-houses were really in the same situation at the time of the fire, that they doubtless would and ought to have been, had no seizure been made. The circumstance of the sheriff's having the keys, and being out of the place at the time of the fire, is immaterial, because it had nothing to do with producing the fire, and could not in the least degree prevent the goods from being destroyed by or saved from it; for the doors could have been forced open, had it been thought that it would have availed anything, in as short a time without the keys, as they could have been opened by the use of them. Findlay, the assured, was present at the fire, and having the same interest in the goods to save them from being destroyed that he ever had, must be presumed to have done all that he would, had the seizure not taken place. There is not therefore any ground, so far as the evidence goes, upon which any increase of risk can well be imagined. The judgment is therefore affirmed.

Judgment affirmed.

ALIENATION OF PROPERTY INSURED so as to release the insurers: See *Lane v. Maine Mut. F. Ins. Co.*, 28 Am. Dec. 150, and note.

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EAGLE v. WHITE.

[6 WHARTON, 505.]

COMMON CARRIERS ARE LIABLE FOR LOSS ARISING BEFORE DELIVERY. This principle was applied to a case where the goods in question arrived at their destination at sundown Saturday evening, but were not delivered, the plaintiffs declining to receive them, it being so late, and directing them to be placed on a sideling, where they remained until Monday morning, locked in the cars, to which defendants had the keys; the loss occurred between Saturday night and Monday morning.

ASSUMPSIT. The opinion states the case. Verdict for the defendants. Writ of error.

Hazlehurst and McCall, for the plaintiffs.

Meredith, contra.

By Court, ROGERS, J. This is an action of assumpsit against the defendants as common carriers. The material facts were these: Eagle & Co. purchased goods from Eagle, Westcott & Cambless, which were packed, marked, and taken to the defendants' store, who undertook to deliver them to the plaintiffs, merchants living in Columbia, Lancaster county. The plaintiffs gave in evidence the receipt of White & Co., and the bill of lading of the goods; and also proved, that when the cars came to be unloaded at Columbia, one of the trunks, No. 445, mentioned in the receipt and bill of lading, was rifled of its contents. There is no room for doubt that the goods never came to the possession or custody of the owners; but it is clear they were lost after the defendants took charge, and before they were actually delivered. It was also proved, that the cars which contained the goods were sent on Haldeman's sideling, by the direction, and at the request of the plaintiffs, on the evening of Saturday, the twelfth of March.

The defense taken at the trial was, that the goods were delivered, or if not delivered, that the delivery was prevented by the interference of the plaintiffs, who took charge of the goods before they arrived at their ultimate place of destination.

A common carrier undertakes generally, and for all people indifferently, to convey goods and deliver them at a place appointed for him, and with or without a special agreement as to price. He is in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident, without the intervention of man and public enemies. This, as Chancellor Kent

remarks in his Commentaries, title Bailment, has been the settled law for ages; and the rule is intended as a guard against fraud and collusion, and is founded on the broad principles of public policy and convenience. It is a principle of extraordinary responsibility, which has stood the test of experience, and which we are unwilling to see frittered away further than has been already done in those cases where carriers have been, as I think, unwisely, permitted to limit their own responsibility. In the contract of carriage, the defendants engage, for a certain price, to deliver the goods intrusted to them into the actual custody of the plaintiffs. They can not discharge themselves from their responsibility as carriers, except by proving that they have performed their engagement, or by showing clearly that they are excused from the performance of the contract by some act of the plaintiff, or that the case falls within some of the excepted cases.

The court very properly charged the jury that it was the duty of the defendants, as common carriers, to cause the goods to be actually delivered to the plaintiffs. And that they were not so delivered, scarcely admits of doubt. The cars arrived at the head of the inclined plane on the afternoon of Saturday, and in pursuance of directions from one of the plaintiffs, were placed on Haldeman's sideling, about sundown of that day. The testimony of two witnesses, Haines and Moss, shows, that so far from the goods being delivered, the plaintiffs refused to receive them, on the allegation that they were engaged, and that it was too late to unload the cars. It also appears that the key of the cars and the manifest were retained by the carriers, and that there was no tender or offer to deliver them to the plaintiffs. It must be remarked, as in *Ostrander v. Brown*, 15 Johns. 48 [8 Am. Dec. 211], the question is not as to the place of delivery, on which I give no opinion, but whether there was any delivery at all. Common carriers are ordinarily bound to carry goods intrusted to their conveyance to the residence or place of business of the consignee; but whether this rule can be conveniently applied to the business usually transacted by canal or railroad may admit of doubt: *McClel. & Y.* 129;¹ *Stone v. Cowley*, 5 T. R. 394.² It can not be pretended that there was an actual delivery. But was there anything proved which is equivalent to an actual delivery? And if there was, it must be in the alleged tender, or because the delivery was prevented by the interference of the plaintiffs.

1. *Storr v. Crowley*, *McClel. & Y.* 129.

2. *Hyde v. Trent, etc. Nav. Co.*

In *Storr v. Crowley*, above cited, it is taken as a general rule, that a carrier, having once tendered a delivery, has discharged himself from his obligation as carrier; because, otherwise, says Alexander, C. B., where is his liability to cease? Where is the line to be drawn, if not there? To construe his undertaking in any other way would be attended with the greatest inconvenience: and I would therefore hold the rule to be as stated in ordinary cases. I take no exception to the rule when confined to his extraordinary responsibility as carrier, and with the qualification that the tender must be made at a proper time, in a proper manner, and at the proper place. If the tender is wanting in any one of these essential requisites, his responsibility as carrier still continues. If this point was made at the time, no notice is taken of it, in the charge. No question of the kind is submitted to the jury, and whether there was a tender in proper time, it is obviously a question, depending as it does on a variety of circumstances, for their consideration. The cars were put on the sideling at or perhaps after sundown, on Saturday; and it is in testimony that it would take at least two and perhaps three or four hours to unload them, and remove the contents to the plaintiffs' store. It would be for the jury to say whether the reasons given for refusing to receive the goods were sufficient to excuse the plaintiffs. A tender merely of the goods, to the consignee, as is said in *Ostrander v. Brown*, 15 Johns. 43 [8 Am. Dec. 211], without their acceptance, would not be a performance of a carrier's duty. And in case of the refusal of the consignee to receive the goods, he is not justified in abandoning them. Although his strict accountability as carrier may cease, he becomes a bailee, and as such must take ordinary care of the goods. We can not avoid seeing, that in this case neither party supposed the goods were delivered, or that the responsibility had ceased. This was an afterthought, after the loss had been incurred, when, as is usual, the ingenuity of the carrier was tasked to find reasons to escape from the consequences of the negligence of his agents.

The court gives an affirmative answer to the several propositions of the plaintiffs, but always with a qualification of which the plaintiffs complain. To the first point, they say: "But the defense taken here renders it necessary for me to add, that if the usual and proper steps toward an actual delivery were prevented by the interference and conduct of one of the plaintiffs, the rule is not applicable; and the jury will decide the facts. The consignee may take charge of the goods before they arrive

at their ultimate place of delivery, and the carrier's risk will then terminate." And again to the second point, the court, after instructing the jury that placing the cars on Haldeman's siding was no delivery to the plaintiffs, add: "But if they were so placed by the plaintiffs' direction, and an actual delivery was thereby prevented, such delivery could not be required." In this, I understand the court to instruct the jury explicitly, that if they believe the cars were put at the place directed by one of the plaintiffs, the carrier's risk terminated; which was in fact equivalent to instructing them to find for the defendant. They put the case entirely on the interference and conduct of the plaintiffs, whereby an actual delivery was prevented, and on the consignee taking charge of the goods before they arrived at the ultimate place of destination. I have looked through the testimony in vain for any evidence on which the court could submit such a point to the jury, and find nothing on which it can be raised except the direction that the cars should be put upon Haldeman's siding. On this part of the case, I throw out of view the point that the plaintiffs began to unload the cars before the arrival of the agent, on Monday, because that is only material as bearing on the question, if it be one, whether the goods were lost while in the custody of the defendants. It can not affect this point, because it took place after the goods had been stolen, or lost, and of course after the carrier's responsibility had attached. If the defendants were injured, which is not very clear, this is not the mode or manner to seek redress. I agree that if a carrier is prevented by the owner from performing his contract, or if the owner takes charge of the goods before their arrival at their place of destination, his responsibility as carrier ceases; but I can not admit that there is any evidence in the case, from which the jury should be permitted to make any such inference. The direction given amounts to nothing more than a designation, or at any rate a change, of the place (acquiesced in by the carrier) where the goods were to be delivered. It was not supposed by either that it excused him from a delivery at all. His duty to deliver remained entirely unchanged. A designation, or change, in the place of delivery or an alteration in the destination, which the owner undoubtedly has a right to make, may, under certain circumstances, be a reason for refusing to obey the instructions, or of charging an additional compensation for the increased trouble or risk, but it can not be considered as operating so as to exempt him from the responsibility attached to his character as a common carrier,

when he obeys the directions of the owner without objection. If we once permit carriers to relieve themselves from the consequences arising from their or their agents' negligence, there will be no want of pretenses and excuses for that purpose, proved, as they can readily be, by the oaths of the persons whose fault or fraud has caused the loss. To avoid all temptations of this kind, the rule which places common carriers on a different footing from other bailees has been wisely adopted, and must be firmly enforced. The great and increasing extent of our internal trade renders all such questions extremely important; and there is great danger in relaxing the ancient rules, which must end in producing uncertainty, and of course numerous and perplexing controversies.

Judgment reversed, and a *venire de novo* awarded.

HUSTON, J., dissenting.

Followed in *Graff v. Bloomer*, 9 Barr, 116; *McCarty v. N. Y. & Erie R. R. Co.*, 30 Pa. St. 252; *Shenk v. Phil. Steam Propeller Co.*, 60 Id. 115, with respect to the liability of common carriers. See *Turney v. Wilson*, 27 Am. Dec. 515 and note; *Orange Co. Bank v. Brown*, 24 Id. 129 and note; *Coll v. Mo-Mechen*, 5 Id. 200; *Craig v. Childress*, 14 Id. 751; *Jones v. Pitcher*, 24 Id. 716; *Robertson v. Kennedy*, 26 Id. 466; *Daggett v. Shaw*, 25 Id. 439; *De Mott v. Laraway*, 28 Id. 523; *Gibson v. Culver*, 31 Id. 297 and note; *Hollister v. Nowlen*, 32 Id. 455 and note; *Cole v. Goodwin*, Id. 470 and note; *Atwood v. Reliance Transportation Co.*, 34 Id. 503 and note.

MCKENNAN v. PHILLIPS.

[6 WHARTON, 571.]

AN AGREEMENT TO LIVE SEPARATE entered into by husband and wife will not be executed in chancery.

A WIFE MAY ACQUIRE A SEPARATE PROPERTY IN EQUITY, by an agreement with her husband, without the intervention of trustees; as where, on an agreement to live separate the parties separate, she relinquishes all right to his estate, and he pays her a sum of money and dies.

A MARRIED WOMAN'S VERBAL DISPOSITION of her property to take effect upon her death is nugatory; and as to such property she dies intestate.

ASSUMPSIT by McKennan, as administrator of the estate of his former wife, whose property the defendant held, claiming it by right of certain verbal directions given to him by her respecting its disposition. The plaintiff and his intestate were husband and wife, and by articles of agreement separated and lived apart, he giving her certain money with which she supported herself, and which was the property in dispute in this action, and she relinquishing all claim upon him for further support. While

living separate she died. A special verdict embodying these facts was rendered, and judgment thereon was given for the defendant. Writ of error.

Tilghman and Bell, for the plaintiff in error.

Dillingham and Chauncey, contra.

By Court, GIBSON, C. J. It seems to be settled, that chancery will not execute an agreement between husband and wife, to live separate, because that would impair the marital rights of the husband at the common law, by giving the wife a degree of personal independence, which would be inconsistent with her conjugal duties. Nothing will be done in furtherance of even a suspension of the marriage contract; and a bill to compel the husband to permit the wife to live separate, or pay the stipulated maintenance, would not be entertained. But further than this, public policy is not concerned; the incidents of the contract of marriage being by no means so sacred. Here the agreement was actually consummated by payment of the maintenance and death of the wife; and all those considerations which would induce a chancellor to withhold his assistance where the object is to interfere with the direct obligation of the marriage contract, are to be put out of view; so that the question comes to this: Can a wife acquire a separate property in equity, by an agreement with her husband, without the intervention of trustees? And a countless train of authorities at once spring up to show, that she can. At the death of the wife then, the money for which this suit was brought was her separate property, and subject to her disposition as a *feme sole*. And it is contended, that she did dispose of it by a valid testamentary act. The jury have found, that she put it into the hands of the defendant, with verbal instructions as to the objects of her bounty; but who or what those objects were are not found; and this disposition, which resembles a nuncupative will more than a *donatio causa mortis*, is void for uncertainty. She therefore died intestate.

The result is, that the husband is entitled as administrator; and might, had the wife died possessed, have maintained the action in his own right. At her death, however, the money was a thing in action, which she could have compelled the defendant to restore only by a suit, and the plaintiff consequently can recover only in a representative capacity. He has sued in his own right, and we are therefore compelled to turn him round to another action.

Judgment affirmed.

Cited in subsequent decisions in this state upon the following proposition: A wife, without the intervention of trustee, can acquire separate property which a court of equity will protect: *Hutton v. Ducey*, 3 Barr, 105; *Fisher v. Filbert*, 6 Id. 67; *Williams' Appeal*, 47 Pa. St. 309; *Penn. Salt Mfg. Co. v. Neel*, 54 Id. 17; *Shonk v. Brown*, 61 Id. 325; *Duffy v. Ins. Co.*, 8 Watts & S. 433. The same point is also ruled in *Carroll v. Lee*, 22 Am. Dec. 350.

OVERDEER v. LEWIS.

[1 WATTS AND SERGEANT, 90.]

LANDLORD MAY FORCIBLY DISPOSSESS TENANT AFTER EXPIRATION of his lease, immediately on his declining to quit possession on request, the tenant being then merely tenant at will, and if there be no unnecessary force or wanton damage the landlord is not liable for injury thereby caused to the tenant's goods.

ERROR to York county common pleas in an action of trespass, to recover for injuries done by the defendant to the plaintiff's goods by their forcible removal from certain premises. The plaintiff had a lease of the premises for a year, and some time after its expiration the defendant, then owner, requested him to quit possession of a certain room on the premises immediately, which he declined to do, asking until next day, when the defendant removed the goods, doing some injury. The instructions are stated in the opinion. Verdict and judgment for the defendant. The plaintiff brought the case up on exception to the instructions.

Ramsey, for the plaintiff in error.

Hambly, for the defendant in error.

By Court. The judge stated the law of the case at a breath. "If the plaintiff," said he, "held under the defendant, as tenant at will, at the time of the alleged trespass, he can not recover for breaking and entering his close, but is entitled to recover damages under his declaration for any trespass proved to have been done to his personal property." Now, as the defendant's lease had expired by its own limitation, there could be no doubt that he was a tenant at will, though he had not received notice to quit—that point was put at rest in *Duncan v. Blashford*,¹ 2 Serg. & R. 480—and the landlord might forcibly dispossess him on the instant, by night, or by day, and for motives of mere caprice; with this limitation only, that he should use no greater force than might be necessary, and do no wanton damage. A tenant at will is bound to remove his property on

1. *Blashford v. Duncan*.

request, without regard to his convenience, and to find a place for it as he may. It was not pretended that the plaintiff had not held over; and the jury were properly directed that he was entitled to damages, only for any injury he had suffered from unnecessary violence to his property.

Judgment affirmed.

TENANT HOLDING OVER AFTER THE EXPIRATION of his lease is a tenant at will: *Bennock v. Whipple*, 28 Am. Dec. 186; and if the landlord enters by force and turns him out, he can not have trespass therefor: *Hyatt v. Wood*, 4 Id. 258. Notice to quit is unnecessary to terminate a lease which expires on a day certain: *Stockwell v. Marks*, 35 Id. 266. In *Evans v. Hastings*, 9 Pa. St. 273, the principal case is cited to the point that after the expiration of a lease given for a definite term the tenant becomes a mere tenant at will; and in *Kellam v. Janson*, 17 Id. 467, and *Low v. Ellwell*, 121 Mass. 315, the case is cited to the point that a lessor may enter and forcibly remove the goods of a tenant at will, or of a tenant whose lease has expired and who has received notice to quit, without subjecting himself to an action for damages if he uses no unnecessary violence. In *Commonwealth v. Kensey*, 2 Par. Sel. Cas. 401, it is held, however, that the landlord in such a case can not enter forcibly without subjecting himself to indictment for a forcible entry, and the principal case is referred to and commented on as not being at variance with the doctrine.

BAYARD v. SHUNK.

[1 WATTS AND SERGEANT, 92.]

BONA FIDE PAYMENT IN NOTES OF BANK WHICH HAS FAILED, neither party having knowledge of the failure, is good and discharges the debt.

ERROR to Dauphin county common pleas, in a case stated in the nature of a special verdict. The material facts stated were that on a judgment heretofore recovered by the plaintiff against the defendants, execution was issued and levied on certain chattels. After the levy the defendants sold and conveyed the chattels to Hickox, terre-tenant in this case, who, upon being notified by the sheriff, paid the amount of the debt and costs, in bills of the Commercial bank of Wilmington, to the sheriff, who receipted therefor in full and released the property. The next day the sheriff tendered the bills to the plaintiff's attorney, who, upon being informed by the cashier of a certain bank that the bills in question were quoted at one half of one per cent. discount, accepted the same from the sheriff and gave a receipt. It subsequently turned out that the Commercial bank stopped payment the day before the payment to the sheriff, though its bills passed current in Harrisburg for several days afterwards. The plaintiff returned the bills in question to the

sheriff, who offered them to the defendants and to Hickox, but they all declined to receive them. The sheriff then returned the facts specially. The question was as to the validity of the payment of the execution. If it was not valid, the plaintiff was to have judgment; otherwise, judgment for the defendants. The defendants had judgment below, and the plaintiff brought error.

Foster and McCormick, for the plaintiff in error.

Rawn, and Johnson, attorney-general, for the defendants in error.

By Court, GIBSON, C. J. Cases in which the bills or notes of a third party were transferred for a debt, are not to the purpose; and most of those which have been cited are of that stamp. Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank notes, though they are of the same mould and obligation betwixt the original parties, is regulated by peculiar principles and stands on a different footing. They are lent by the banks as cash; they are paid away as cash; and the language of Lord Mansfield in *Miller v. Race*¹ was not too strong when he said, "they are not goods, nor securities, nor documents for debts; but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash." If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young v. Adams*, 6 Mass. 182, that our bank notes are private contracts without a public sanction, like that which gives operation to the lawful money of the country; but it is also true that they pass for cash, both here and in England, not by force of any such sanction, but by the legislation of general

consent, induced by their great convenience, if not the absolute necessities of mankind. *Miller v. Race* is a leading case which has never been doubted in England, or, except in a case presently to be noticed, in America; and it goes very far to rule the point before us; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from impurities in the medium which keeps it in motion, except those which—few and far between—are occasioned by forgery, bank notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point, is decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt. Though *Camidge v. Allenby*, 6 Barn. & Cress. 373; S. C., 13 Eng. Com. L. 202,¹ was not a case of payment in bank notes, but in the cash notes of a banker who had failed a few hours before, it was held that if they were to be considered as cash, the debt would be discharged; but if as negotiable paper merely, the holder was bound to use due diligence in procuring payment of them; and that in either aspect the same result was inevitable. Such notes, however, though formerly called goldsmiths' notes, have not been treated as cash by the merchants or the courts. Strictly speaking, they are ordinary promissory notes; for none but those of the bank of England are considered bank notes in that country. The judges, however, seem to have hesitated as to their precise character in that case; but they distinctly decided that *bona fide* payment in notes which have received the qualities of money from the conventional laws of trade, is absolute satisfaction notwithstanding the previous failure of the drawer. In America we have a decision directly to the point, in *Scruggs v. Gass*, 8 Yerg. 175 [29 Am. Dec. 114], in which the supreme court of Tennessee held that payment in the notes of a bank which had failed discharged the debt; and in *Young v. Adams*, already quoted, we have a decision of the supreme court of Massachusetts to the same purport.

In contrast with these stands *Lightbody v. The Ontario Bank*, decided by the supreme court of New York, 11 Wend. 1, and affirmed in the court of errors: 13 Id. 101 [27 Am. Dec. 179]. The judges and senator who delivered opinions in that case, seem not to have coincided in their intermediate positions, though they arrived at the same conclusion. The chief justice who delivered the opinion of the supreme court, appears to have thought that a bank note stands on the footing of any other

1. 13 Eng. Com. L. 175.

promissory note; that as he who parts with what is valuable ought on principles of natural justice to receive value for it in return, a vendor is not bound by an agreement to accept promissory notes should they have been bad at the time of the transaction; and that payment in the notes of an insolvent bank is no better than payment in counterfeit coin. It is obvious that this involves a contradiction; for to confound bank notes with ordinary promissory notes would subject a debtor, who had paid them away, to the risk of the bank's ultimate solvency. In the court of errors, the chancellor, having premised that a state is not at liberty to coin money or make anything a legal tender but gold or silver, and consequently that the practice of receiving bank notes as money is a conventional regulation, and not a legal one, concluded that where the loss has already happened by the failure of the bank, there is no implied agreement that the receiver shall bear it; and that if he were called on to express his sense of the transaction at the time, he would say what natural justice says, that the risk of previous failure in the value of the medium must be borne by the debtor. He would more probably say that he had not thought or formed an opinion about it. Senator Van Schaik also insisted much on the natural justice of the principle, and asserted that no case in the books authorizes an inference that bank notes are considered as money except in the universally implied condition that the banks which issued them are able to redeem them at the time of the transfer. In *Miller v. Race*, 1 Burr. 452, however, we have seen that Lord Mansfield asserted on the other hand that they are money without any qualification whatever; and *Camidge v. Allenby*, as well as *Scruggs v. Gass*, affirms that they may retain the character of money after the period of the bank's failure. To assume that solvency of the bank at the time of the transfer is an inherent condition of it, is to assume the whole ground of the argument. The conclusion concurred in by all, however, was that the medium must turn out to have been what the debtor offered it for at the time of the payment. How does that consist with the equitable principle that there must be, in every case, not only a motive for the interference of the law, but that it must be stronger than any to be found on the other side; else the equity being equal, and the balance inclining to neither side, things must be left to stand as they are: Fonb., b. 1, c. 5, sec. 3; Id., c. 4, sec. 25; in other words, that the law interferes not to shift a loss from one innocent man to another equally innocent, and a stranger to the cause of it.

The self-evident justice of this would be proof, were it necessary, that it is a principle of the common law. But we need go no further in search of authority for it than *Miller v. Race*, 1 Burr. 452, in which one who had received a stolen bank note for a full consideration in the course of his business, was not compelled to restore it. It was intimated in *Ontario Bank v. Lightbody*, that there was a preponderance of equity in that case, not on the side of him who had lost the note, but of him who had last given value for it. Why last? The maxim, *prior in tempore, potior in jure*, prevails between prior and subsequent purchasers indifferently of a legal or an equitable title. It is for that reason the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for everything which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it. But general convenience requires that he should not; and it was that principle, not any consideration of the equities betwixt the parties, which ruled the cause in *Miller v. Race*. But a more forcible illustration of the principle, were the case indisputably law, might be had in *Levy v. Bank of the United States*, 4 Dall. 435;¹ S. C., 1 Binn. 27; in which the placing even a forged check to the credit of a depositor as cash—a transaction really not within any principle of conventional law—was held to conclude the bank; and to this may be added the entire range of cases in which the purchaser of an article from a dealer, has been bound to bear a loss from a defect in the quality of it. And for the same reason that the law refuses to interfere between parties mutually innocent, it refuses to interfere between those who are mutually culpable; as in the case of an action for negligence. The rule of the admiralty being that of the civil law, would apportion the loss; but it has no place in any other court.

What is there, then, in the case before us to take it out of this great principle of the common law? The position taken by the courts of New York is, that every one who parts with his property is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in precious stones, if such is the bargain. But where he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to anything further is at an end. Bills of exchange and promissory notes enter not into the transactions of commerce, as money; but it impresses even these with qualities which do not

1. 4 Dall. 234.

belong to ordinary securities. The holder of one of them, who has taken it in the ordinary course, can recover on it, whether there was a consideration between the original parties or not; and if no man can part with his property, except subject to an inherent right to have the worth of it, at all events, why should not the drawer of a note be at liberty to show want of consideration against an indorsee, on the ground that no one can pledge his responsibility without having received what he expected for it? Or why, on the supposed moral and public considerations that were invoked in the discussion of the general principle, should the vendee of a chattel be bound to pay for it, though it turn out to be inferior in quality to what he expected it to be? It is because it would stop the wheels of commerce to trace the defect through a series of transactions to the author of it; and dealers must, therefore, take the risk of it for the premium of the profits. And may not dealers as well as insurers take the risk of an event which may have already happened? The creditor does agree to take the risk of the bank's solvency when he makes its notes his own without reserve.

The assertion, that it is always an original and subsisting part of the agreement, that a bank note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin, is disproved by daily experience, which shows that they circulate by the consent of whole communities at their nominal value, when notoriously below it. But why hold the payor responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of a mortal disease in him, might refuse to pay for him though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further

apart, and the bank may have stopped in the mean time; or it may stop at the instant of presentation when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank note as an ordinary promissory note, would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers, would more than counterbalance the good to be done by hindering a crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it in all beside to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential existence: 2 Kent, 468; and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a dead horse is a living one; and it is an elementary principle that what has no existence can not be the subject of a contract. But it can not be said that the genuine note of an insolvent bank has not an actual and a legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note-holders and depositors; and even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and even the vestiges of the bank, disappeared in a few

hours after the first symptoms of its failure. But independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel.

What, then, becomes of the boasted principle that a man shall not have parted with his property until he shall have had value, or rather what he expected for it? Like many others of the same school, it would be too refined for our times, even did a semblance of natural justice lie at the root of it. But nothing devised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done, in any case, is no more than an approximation to it; and when the incidental risks of a business are so disposed of as to consist with the general convenience, no injustice will in the end be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. But nothing can be more exactly balanced than the equities of parties to a payment in regard to the risk of the medium when its worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair, or any other infinitesimal quantity that can be imagined; and in such a case, the common law allows a loss from mutual mistake to rest where it has fallen, rather than to remove it from the shoulders of one innocent man to the shoulders of another equally so. The civil law principle of equality, however practicable in an age when the operations of commerce were few, simple, and circumspect, would be entirely unfit for the rapid transactions of modern times: it would put a stop to them altogether. No man can withhold his praise of the civil law, as a wonderful fabric of wisdom for its day, or deny that it has contributed largely to the best parts of our jurisprudence; but all its materials of superior value have already been worked up in our more commodious modern edifice; and if the cultivation of an acquaintance with it is to beget a desire to substitute its abstract principles for the maxims of the common law—the accumulated wisdom of a thousand years' experience—it were better that our jurists should die innocent of a knowledge of it. This longing after its peculiar doctrines began with Mr. Verplanck's commentary on the decision of the supreme court of the United States in *Laidlaw v. Organ*, 2 Wheat. 178; and it was subsequently indulged by the supreme court of his own state so far as to sap the foundation of its own sound decision in *Seixas v.*

Wood, 2 Cai. 48 [2 Am. Dec. 215]. In *Laidlaw v. Organ*, the purchaser refused to disclose his information that the article had risen in the market, and there was therefore room for a pretense of inequality in the circumstances of the parties; but where they have acted as in this case, in equal ignorance, and with equal good faith, that pretense, flimsy as it was even there, is wanting, and the law on principles of justice, as well as convenience, refuses to interfere between them. It is therefore unnecessary to insist on the provisions of our statute of 1836, which enacts that "it shall be lawful for the officer charged with the execution of any writ of *fieri facias*, when he can find no other real or personal estate of the defendant, to seize and take the amount to be levied by such writ, of any current gold, silver, or copper coin belonging to the defendant, in satisfaction thereof; or he may take the amount aforesaid of any bank notes, or current bills for the payment of money, issued by any moneyed corporation, at the par value of such notes." At least for the purpose of seizure in execution, therefore, bank notes are money; and had the sheriff returned that he had seized these notes as the defendant's property, instead of the property itself, it would not be pretended that the debt was undischarged. But though he returned the facts specially, the notes were received as cash by the plaintiff's attorney; and after that, on no principle whatever could the transaction be thrown open. The plaintiff's case is an unfortunate one, but we could not relieve him without imposing an equal misfortune on the defendants.

Judgment affirmed.

PAYMENT IN BILLS OF INSOLVENT BANK, EFFECT OF.—This subject is discussed in the note to *Ontario Bank v. Lightbody*, 27 Am. Dec. 188. See also *Lowrey v. Murrell*, Id. 651; *Corbit v. Bank of Smyrna*, 30 Id. 635 and note; *Gilman v. Peck*, 34 Id. 702; *Wainwright v. Webster*, Id. 707. In the two last of the cases above cited it is held, contrary to the doctrine of *Bayard v. Shunk*, that a payment in such bills is not valid and does not discharge the debt, even though both parties are ignorant of the insolvency of the bank. In *Green v. Sizer*, 40 Miss. 560; *Westfall v. Braley*, 10 Ohio St. 190; and *Johnson v. Titus*, 2 Hill, 607, the principal case is cited on this point; but in one of these decisions, *Westfall v. Braley*, it is held, contrary to the doctrine of *Bayard v. Shunk*, that where one makes a payment in the bills of a bank which has stopped payment, which is not known to either of the parties, the loss, in the absence of any special agreement, must fall on the payor unless the payee is guilty of laches in not returning the bills in a reasonable time.

BANK BILLS CIRCULATING AS MONEY by common consent are to be treated as cash, and not merely as securities for money in making payment; *Northampton Bank v. Balliet*, 8 Watts & S. 317; *Crocker v. Wolford*, 5 Phila. 345; *Shollenberger v. Brinton*, 52 Pa. St. 85; *Latham v. United States*, 1 Nott & H. 154, all citing the principal case. But the rule is held not to apply to checks on banks: *McIntyre v. Kennedy*, 29 Pa. St. 450.

FINNEY v. COCHRAN.

[1 WATTS AND SERGEANT, 112.]

EVIDENCE OF CLAIM AGAINST WHICH STATUTORY TIME has run is admissible, because the plaintiff may produce other evidence taking it out of the operation of the statute.

EVERY PERSON IS TRUSTEE WHO RECEIVES MONEY TO BE PAID to another, or to be applied to a particular purpose to which he does not apply it, and is liable either at law for money had and received, or in equity for breach of trust.

STATUTE OF LIMITATIONS APPLIES TO TRUSTS COGNIZABLE AT LAW as well as in equity, and may be pleaded to an action for money had and received, brought to recover surplus moneys collected by a surety or indorser on securities deposited with him by the principal debtor for his indemnification, after such surety or indorser has been reimbursed the amount which he has been compelled to pay for the debtor.

ACCEPTING CONFESSION OF JUDGMENT BY SURVIVOR IN JOINT ACTION against two obligors, where one has died pending the action, discharges the latter's estate.

ERROR to the Dauphin county common pleas, in an action for money had and received, brought in Ferguson's name, for the use of Cochran against Thomas Finney. Pleas, *non assumpsit infra sex annos*, payment, etc. The action was brought to recover certain moneys received by Thomas Finney on four bonds deposited with him by Ferguson in March, 1824, to indemnify the said Finney for indorsing a certain note for Ferguson, and on two other bonds deposited by said Ferguson with the said Finney in May, 1824, to indemnify him for his father, Samuel Finney, then deceased, on a certain note from Ferguson to the said Samuel Finney, and also for the said Samuel Finney's having become bound as bail for Ferguson in an action brought by one Mary Milligan, an action having been brought on the bail bond and being still pending. Certain evidence offered by the plaintiff to prove certain receipts of money by the defendant on the bonds in question more than six years before the commencement of the action, was admitted against the defendant's objection, and the defendant excepted. The grounds of objection appear from the opinion. It was proved that the plaintiff Ferguson, on March 18, 1840, confessed judgment in the action brought by Mary Milligan against the said Milligan and Samuel Finney on the bail bond above referred to, *scire facias* having previously issued to make the administrators of Samuel Finney parties defendant, and they having pleaded that no *scire facias* could issue because there was a surviving obligor. It is unnecessary to state the other facts further than they appear from

the opinion. The court instructed the jury, among other things, that the said Finney was trustee for Ferguson for the purpose of receiving the money on the bonds deposited with the said Finney, and that to such a trust the statute of limitations was no bar. Other instructions, so far as material, appear from the opinion. Verdict and judgment for the plaintiff, and the defendant brought this writ of error. The substance of the four errors assigned appears from the opinion.

J. A. Fisher, for the plaintiff in error.

McCormick, for the defendant in error.

By Court, KENNEDY, J. This action was brought in the court below, by John Cochran, for his use, in the name of David Ferguson, against Thomas Finney, for money had and received by him for the use of the latter. The first error is a bill of exceptions to the opinion of the court, admitting evidence of the receipt of moneys by the defendant below, more than six years before the commencement of the action. The objection made to the admission of this evidence was, that it went to show moneys received by the defendant more than six years before this suit was brought; and as he had pleaded the statute of limitations in bar to it, the evidence was therefore inadmissible. This was certainly no sufficient objection to the admission of the evidence, because the plaintiff might have other evidence to give which would take the debt created by the receipt of the money, out of the operation of the statute; but before he could do this, it was necessary that he should show the previous existence of the debt. The evidence was therefore properly admitted for this purpose.

The second and third errors present but one question; and that is: Was the statute of limitations applicable to any portion of the plaintiff's claim? The court below held that it was not, and so instructed the jury. In this, however, we are of opinion that the court erred. The opinion of the court seems to have been founded on the idea, that the defendant was a trustee for the plaintiff, and that he received all the money in that character which the plaintiff sought to recover in this action. No doubt the defendant was a trustee, and as such received the moneys upon the bonds which were committed to his charge by the plaintiff. The receipts given by the defendant for the bonds, upon which he received the moneys afterwards, show clearly that the trust was express and direct. Every person who receives money to be paid to another, or to be applied to a par-

ticular purpose, to which he does not apply it, is a trustee, and may be sued, either at law, for money had and received, or in equity, as a trustee for a breach of trust: Per Chief Justice Willes in *Scott v. Surman*, Willes, 404, 405. The reciprocal rights and duties, founded upon the various species of bailment, and growing out of those relations, as between "hirer and letter to hire, borrower and lender, depository and the person depositing, a commissioner and an employer, a receiver and a giver in pledge," are all cases of express and direct trust; and these contracts, as Sir William Jones observes (*Jones on Bail*. 2), are "among the principal springs and wheels of civil society." Yet it is perfectly clear that the most, if not all of these cases, as also all of the like kind, come within the statute of limitations: See *Kane v. Bloodgood*, 7 Johns. Ch. 110, 111 [11 Am. Dec. 417], where Chancellor Kent, after reviewing the decisions on this subject, has come to the following conclusion: that the trusts intended by courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper peculiar and exclusive jurisdiction of a court of equity. And he expressly refuses to give his assent to the proposition, that all cases of direct and express trust, and arising between trustee and *cestui que trust*, are to be withdrawn from the operation of the statute of limitations, where there is a clear and certain remedy at law. The rule thus laid down by Chancellor Kent seems to be recognized and approved in *App v. Dreisbach*, 2 Rawle, 302 [21 Am. Dec. 447], and *Lyon v. Marclay*, 1 Watts, 275; and indeed it would seem to be dictated not only by authority, but sound policy. The word "trust" is frequently used in a very comprehensive sense; and to hold that the statute of limitations is not applicable to any cases which may, even with propriety, be denominated cases of trust, would, in a great measure, defeat, as I apprehend, the plain and manifest intention of the legislature. A great proportion of the money transactions in the ordinary business of life, where no instrument under seal passes between the parties, would be excluded from its operation, and a flood of litigation arise after a lapse of six years, which, owing to the length of time, it would be in many instances impossible to determine according to truth and justice between the parties. The trust in the present case was clearly cognizable at law; and for a breach of it the plaintiff might, at any time, have maintained an action at law, in order to be redressed, if he had not de-

layed so long as to let the statute interpose a bar to his doing so. The last of the money received by the defendant in discharge of the four bonds mentioned in his first receipt to the plaintiff was as far back as the eleventh of October, 1831, something more than eight years anterior to the commencement of this action. The whole of the money received on the three first of these bonds, and a part of that received on the fourth, the defendant, by the terms of the receipt which he gave to the plaintiff for the bonds, had a right to retain to reimburse him for the one thousand two hundred and twelve dollars and eighty cents, paid in June, 1825, in discharge of his indorsement for the benefit and accommodation of the plaintiff. But the surplus the defendant was bound, and ought to have paid or settled in some way with the plaintiff, without delay, after his receipt of it. If he neglected or failed to do this, the plaintiff might have brought his action for the recovery of it immediately, for it had become a debt due to the plaintiff, which the defendant was bound to pay him without even a demand being made for it. His right to maintain such action, therefore, accrued at the time the defendant received this surplus; and from that instant the statute of limitations commenced running, so that the six years, the time allowed by the statute for commencing suit, had run some two years and a half before it was commenced. But as regards the money received by the defendant in discharge of the two bonds mentioned in the second receipt, given by him for them to the plaintiff, it would rather seem that the statute of limitations had not run so as to form a bar to the recovery of it. The amount of the last of these two bonds had been received by the defendant within six years before the commencement of the action: and the claim of Mary Milligan not being settled, but kept up against the estate of Samuel Finney, deceased, until within six years before commencing the action, the defendant, by the terms of his receipt given for the bonds, had a right to retain the money received upon them until the estate of Samuel Finney should be clearly acquitted of all liability from Milligan's claim on a bond then in suit against Ferguson and Samuel Finney as bail in the bond of Ferguson; which would seem not to have been the case until a judgment was obtained against Ferguson, the plaintiff here, who it appears is the surviving obligor in the bond with Samuel Finney to Mary Milligan, and likewise the surviving defendant in the suit brought by her upon the bond against Finney and him, jointly, wherein the judgment was so

obtained on the twenty-eighth of March, 1840, a few days only before the commencement of this action.

The fourth error, which is the last, is an exception to that part of the charge of the court, in which they instructed the jury that "no money could be retained by the defendant for the bond where Samuel Finney was bail to Mary Milligan. We instruct you as the law of the case, that the estate of Samuel Finney is discharged from any legal claim on the part of Mary Milligan. That by her bringing a suit against David Ferguson and Samuel Finney, jointly, she made them joint obligors; and Samuel Finney dying, pending the suit, and the plaintiff accepting a judgment of the co-obligor, this is a discharge of the estate of Samuel Finney, and therefore, under the facts disclosed, the defendant can not retain anything out of this money to secure that estate against any liability on that account—this obligation has ceased." We can perceive no error in this instruction. The judgment, however, must be reversed on the second and third errors.

Judgment reversed, and a *venire de novo* awarded.

STATUTE OF LIMITATIONS WHEN A BAR IN CASES OF TRUST, and when not: See *Shelby v. Shelby*, 5 Am. Dec. 686; *Wallace v. Duffield*, 7 Id. 660; *Decouche v. Savetier*, 8 Id. 478 and note; *Kane v. Bloodgood*, 11 Id. 417 and note; *Thomas v. White*, 14 Id. 56; *Guphill v. Isbell*, 19 Id. 675; *App v. Dreisbach*, 21 Id. 447 and note; *Edwards v. University*, 30 Id. 170 and note. See also the note to *Frame v. Kenny*, 12 Id. 372, discussing the subject at some length. The doctrine of the principal case, that a trust cognizable at law as well as in equity is within the statute of limitations, is referred to with approval in *Alexander v. Westmoreland Bank*, 1 Pa. St. 398; *Derrickson v. Cady*, 7 Id. 31; *Alexander v. Leckey*, 9 Id. 122.

THAT WHERE A FUND IS LODGED WITH ONE TO BE PAID TO ANOTHER or to be applied in a particular way, a trust is created which is cognizable both at law and in equity, is a point to which *Kirkpatrick v. McDonald*, 11 Pa. St. 392, cites *Finney v. Cochran*.

JUDGMENT AGAINST ONE OF TWO JOINT DEBTORS, if unsatisfied, does not bar a subsequent action against the other where the latter was absent from the state when the first suit was brought: *Olcott v. Little*, 32 Am. Dec. 357, in which the rule as to when a judgment against one joint debtor releases the others is somewhat discussed. An unsatisfied judgment against one of the obligors of a several bond is no bar to an action against the other: *Armstrong v. Prewitt*, Id. 338, and note citing other cases.

LEHMAN v. JONES.

[1 WATTS AND SERGEANT, 126.]

PROOF THAT MAKER OF NOTE HAS ABSCONDED before the day of payment dispenses with the necessity of showing demand against him, or an attempt at demand, in order to charge the indorser; otherwise where the maker has merely changed his residence.

ERROR to Lebanon county common pleas in an action of assumpsit to recover a certain sum which the plaintiffs had been compelled to pay to take up a note drawn by one Robinson, payable to the defendants or order, which the plaintiffs had indorsed at the defendants' request, to enable the latter to get it discounted. The note, not having been paid at maturity, was protested and the defendants notified. The plaintiffs afterwards paid the amount. No proof of demand was made, but the plaintiffs, to excuse demand, offered evidence tending to show that before the day of payment Robinson absconded and has never returned. The evidence was admitted against the defendant's objection and the defendants excepted. It is not necessary to refer to other exceptions. The court below instructed the jury that if they believed the evidence as to the absconding of Robinson, a demand was unnecessary. Verdict and judgment for the plaintiffs, and the defendants brought error.

L. Kline and E. Pearson, for the plaintiffs in error.

Foster and Weidman, for the defendant in error.

By COURT. The rule in *Lambert v. Oakes*, 1 Ld. Raym. 443, is, that the holder must have demanded, or done his endeavor to demand the money. But the law is not so unreasonable as to require an impossibility: and therefore it is said, *Anon.*, Id. 743, that where the drawee of a bill has absconded before the day of payment, notice of the fact is equivalent to notice of demand and dishonor. In *Duncan v. McCullough*, 4 Serg. & R. 480, the principle was recognized as being applicable to a promissory note; and it has been established by direct decision in some of our neighboring states. It would have been idle for the plaintiffs to demand payment at the late residence of Robinson, the drawer, after he had absconded. Where, indeed, the drawer of a note or the drawee of a bill has merely removed from the place of his residence indicated by the bill, it is the business of the holder to inquire for him and ascertain where he has gone, in order that he may follow him; but when he has secretly fled, an application at the place would lead to no information in respect to him,

and the law requires nothing which is nugatory. The other errors are either resolvable by this principle, or are plainly unfounded.

Judgment affirmed.

WHERE THE MAKER OF A NOTE ABSCONDS before its maturity or removes to another state, the holder is not required to make or prove a demand in order to charge the indorser: *Putnam v. Sullivan*, 3 Am. Dec. 206; *Gist v. Lybrand*, 11 Id. 595. Otherwise where he merely removes to another place in the same state: *Anderson v. Drake*, 7 Id. 442. In *Galpin v. Hard*, 15 Id. 640, it is held that the removal of the maker of a note from the place where he resided, or was in the note represented to reside, imposes upon the holder the duty of using every reasonable endeavor to find the maker and demand payment of him in order to charge the indorser.

POTT v. NATHANS.

[1 WATTS AND SERGEANT, 155.]

SURETY PAYING DEBT IS ENTITLED TO BE SUBROGATED to the creditor's right to enforce a judgment previously recovered on a note given by a third person after several judgments against the principal and surety, as collateral security to obtain a stay of execution against the principal.

ERROR to Schuylkill county. Rule to show cause why the plaintiff Nathans should not have a certain judgment marked to his use which had been previously recovered against the defendants by the Philadelphia loan company. It appeared that Nathans was indorser for one Shoemaker on a note to the loan company, which not being paid, separate judgments were recovered thereon against the principal and indorser, and execution issued against the principal. The present defendants gave their note to the loan company, payable at sixty days, as collateral security, to obtain a stay of the execution against Shoemaker, stipulating that on payment of the note the judgment should be transferred to them. The amount was not paid at the expiration of the sixty days, and the defendant's note was then sued on and the judgment now in question recovered. The plaintiff Nathans afterwards paid the original debt, and applied for the present rule. Rule made absolute, and the defendants brought error.

Parry, for the plaintiff in error.

Hughes, for the defendant in error.

By Court, SERGEANT, J. The general doctrine that a surety who pays to the creditor the debt due by his principal, shall en-

joy the benefit of the securities for the debt placed in the power of the creditor by the principal, has been acted on by courts of equity, and recommends itself to our sense of justice. It seems right, that the creditor should transfer the means of indemnification, for which he has no longer occasion, to him who, under a legal obligation to pay, in default of the principal debtor, has released these securities from the demand of the creditor, and paid the debt for which they were furnished. Where, however, such means consist of the responsibility of an individual, becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities, which may give rise to new questions as to priority between the former and the latter surety. Such latter surety, stipulating at the instance of the principal to pay the debt, suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use, as a payment by himself, the money which proceeds from another person whom his principal was previously bound to save harmless. How the equity would be, in a naked case of this kind, I give no opinion; it is sufficient that it is settled, that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates.

This principle seems to have been determined by this court in the case of *Burns v. The Huntingdon Bank*, 1 Penn. 395, which I am not able to distinguish from the present. There a judgment was obtained against the maker of a promissory note, who afterwards entered absolute security, under the act of assembly, in order to obtain a stay of execution. After the expiration of the time stipulated in the stay of execution, judgment was obtained against the surety, and it was held that one of two indorsers who paid the note was entitled to an assignment of the judgment against the surety. The case now before us is also that of an indorser, who is in point of law but a surety, and is entitled to all the rights and remedies of a surety. One of those rights is to be subrogated to the means of indemnity, in the hands or under the control of the creditor, if the surety steps into the place of the principal, and pays his debt. The creditor here was the Philadelphia loan company; and when Nathans paid, as indorser, the right of the company against Pott, Clemens & Patterson was complete by virtue of the promissory note of the eleventh of June, 1839, taken by the attorney of the company from Shoemaker, as collateral security for their judg-

ment against him. The receipt for the note given by the attorney, was an engagement for a stay of execution till the time of its payment; for it stipulates that on paying the note the judgment should be transferred to such of the makers as should pay it; and the attorney immediately stayed proceedings on the execution. The execution had been levied on the real estate of the principal when the three makers of the note interposed, and procured its stay, by giving their note. So that it runs parallel with the case of *Burns v. The Huntingdon Bank*, where the stay was obtained by the entry of absolute bail for the payment of the money. The equity in that case was held to arise from the interposition of the bail to procure a personal advantage to the principal, to the detriment of the surety, who might perhaps have been exonerated had not the proceedings been stayed against the principal.

Several cases have been cited, in which it has been held that the relation of principal and surety ceases, as respects the creditor, after judgment. But the contrary doctrine seems to have been held in the case above mentioned, and also in that of *Commonwealth v. Haas*, 16 Serg. & R. 252, where, after judgment, the creditor issued execution against the principal, and levied on his goods and chattels, and it was held, that the surety was discharged to the amount which the goods would have sold for. These cases show that after judgment the creditor is required not to abandon the means in his hands, which might prove available for the relief of the surety, nor to do any act which may prejudice the surety.

Judgment affirmed.

SURETY PAYING DEBT IS ENTITLED TO BE SUBROGATED to all the creditor's rights, securities, and remedies to obtain reimbursement: *Cullum v. Emanuel*, 34 Am. Dec. 757, and cases cited in the note thereto; *McClung v. Beirne*, Id. 739. The principal case is cited on this point in *Hirnes v. Keller*, 3 Watts & S. 404, and in *Gossin v. Brown*, 11 Pa. St. 532; in the former of these two cases, however, it was held that such subrogation will not be allowed to the prejudice of other creditors who are not parties to the arrangement except in a very clear case. In *Armstrong's appeal*, 5 Watts & S. 356, the principal case is cited to the point that one who as bail interposes and thereby hinders and delays the payment of a debt sued for has less equity than a prior surety. In *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 7 Id. 343, the principal case is referred to as expressly rejecting the doctrine that a judgment against a principal and surety extinguishes the relation between them as to every one but themselves, and it is there held that where, after separate judgments against a principal and surety, the creditor agrees for a sufficient consideration to give time to the principal, the surety is thereby discharged. The principal case is cited to the same point in *Trotter v. Strong*, 63 Ill. 275.

KING v. KING.

[1 WATTS AND SERGEANT, 205.]

VESTED LEGACY IS GIVEN BY A BEQUEST of the interest of a sum to the testator's wife for life, and after her death giving the principal to the testator's children "or their heirs" to be divided equally, and on the death of one of the children, living the wife, his share, at her death, goes to his personal representative.

ERROR to York county common pleas, in an action for a legacy claimed by the administrators of Henry King, and also by his children under the will of Henry King's father, Philip King. The material portion of the will is stated in the opinion. Henry King died in 1817. Catharine King, the testator's widow named in the will, died in 1826. If the will gave a vested legacy to the testator's children, Henry King's share was to go to his children, of whom the plaintiff was one; otherwise to his administrators, the defendants. Judgment for the defendants, and the plaintiff brought error.

Hambly, for the plaintiff in error.

Barnitz, jun., and Barnitz, for the defendants in error.

By Court, GIBSON, C. J. It is impossible to distinguish this case from *Patterson v. Hawthorn*, 12 Serg. & R. 113, in which the fund was bequeathed to the children at the death of the widow to whom the produce of it was given during her life, while here it is bequeathed to them after her decease—a difference of expression which is immaterial to the question of intention, as the words do not, in either case, strictly import a present gift; for as we determined in *Moore v. Smith*, 9 Watts, 403, a naked direction to pay at a given period, as much imports a contingency as does a gift expressly at the period. Nor is the implication of intention from these words, to be varied, because it does not appear in the case before us whether one of the children was a daughter, whose marriage might possibly have been promoted by having a vested legacy—a circumstance which it was thought, in *Patterson v. Hawthorn*, would naturally weigh with the testator to give the legacy absolutely—for if the legacy of a daughter would be vested by that consideration, the legacy of a son must be so also, where the same words are to be applied to both. The ruling principle of that case is, that where there is no room, in the event of a child's death, living the first legatee, for an implication of intention to give its share to the survivors, a limitation to the children, or their heirs, shows no more than

a design to give it to them while living, with capacity to transmit it when dead to such persons as may by the laws of the land be their legal representatives; to express it differently, that the particular words create a limitation, and not a bequest over. This principle removes every difficulty from the case; for where the enjoyment of an entire fund is given in fractional parts, at successive periods which must eventually arrive, the distinction betwixt time annexed to payment, and time annexed to the gift, becomes unimportant. In such a case, it is well settled that all the interests vest together. Thus a legacy to one for life, and to another at his death, goes to the legal representatives of the latter, should he not live to take it himself. This rule was recognized in *Balmain v. Shore*, 9 Ves. 50,¹ as governing dispositions of property in general, though for peculiar reasons it was not applied in that instance to a limitation, in a partnership deed, to the widows of the partners for their respective lives, and subsequently to their children. But other cases conclusively show that where the enjoyment is divided into successive periods, all the fragments of it vest at the same time. Such is the effect of *Benyon v. Maddison*, 2 Bro. C. C. 75; *Monkhouse v. Holme*, 1 Id. 298; *Taylor v. Langford*, 3 Ves. 119; *Blamire v. Geldart*, 16 Id. 314; *Scurfield v. Howes*, 3 Bro. C. C. 90; *The Attorney-General v. Crispin*, 3 Ves. 386;² and some others. In the application of the principle to cases where only dividends or interest is given to the first legatee, the difficulty is to determine whether the context shows that the ownership of the fund was not intended to pass in his life-time; for where the disposition of the produce is distinct from that of the capital, the interest in the latter will vest only at the time of its distribution. There are many cases to this effect, such as *Billingsley v. Wills*, 3 Atk. 219, and *Bennett v. Seymour*, Amb. 521, in each of which the ultimate objects of the testator's bounty could not be ascertained before the death of the first legatee; and *Thicknesse v. Liege*, 3 Bro. P. C. 365; *Smith v. Vaughan*, Vin. Abr., tit. Devise, pl. 32, and *Spencer v. Bullock*, 2 Ves. jun. 687, in which the ulterior bequests would have frustrated a principal purpose of the will had they vested in the life-time of the first legatee. A bequest of dividends is a clear exception to the general rule; for in *Batsford v. Kebbell*, 3 Ves. 363, Lord Rosslyn pronounced them to be no part of any general fund, but always a distinct subject of separate bequest. Cases of interest are more critical; yet in most of the preceding cases adduced in support of the general rule, the

1. 9 Ves. 500.

2. 1 Brown C. C. 386.

first legatee had no more than the interest accruing on a mortgage or a trust fund. And the cases instanced as exceptions to the rule are perhaps not properly such, but instances in which the rule of interpretation has been overborne by an opposing intention collected from all the parts of the will. But to preclude the operation of the rule in any case, such an intention must be clear, manifest, and indisputable. What is there in this will then to show the ulterior limitations to be palpably contingent? "I give and bequeath," says the testator, "to my beloved wife, Catharine, the yearly interest of six hundred pounds, to be paid to her yearly and every year during her widowhood and no longer; which sum of six hundred pounds I order my executors from time to time to put to interest for the purpose aforesaid; and after my wife's decease or widowhood, I give and bequeath the said principal sum to my children, hereafter named, or their heirs, to be divided among them share and share alike." The effect of the words "or their heirs" (and there is nothing else to import contingency) is disposed of, as I have said, by *Patterson v. Hawthorn*; but even if they were not, they seem to be referable rather to the time of distribution than to the vesting of the interest in the fund. There was to be no survivorship to the exclusion of the issue of deceased children; and there was, therefore, nothing in the terms of the bequest inconsistent with the vesting of a present interest in the children named. Henry King was one of those children; and we are therefore of opinion that the interest in contest vested in him in his life-time.

Judgment affirmed.

VESTED LEGACIES ARE GIVEN BY A WILL, WHEN: See *Pric. v. Watkins*, 1 Am. Dec. 222; *Boone v. Sinkler*, Id. 622; *Stone v. Massey*, Id. 345; *Bowles v. Drayton's Ex'rs*, Id. 689; *Fairly v. Kline*, 4 Id. 414; *Scott v. Price*, 7 Id. 629; *Birdsall v. Hewlett*, 19 Id. 392. See also *Mowatt v. Carow*, 32 Id. 641. The doctrine of the principal case on this point is approved and applied in *Reed v. Buckley*, 5 Watts & S. 520; *Buckley's Adm'rs v. Reed*, 15 Pa. St. 66 (both cases arising on the same will); *Bayard v. Atkins*, 10 Pa. St. 18, and *Hempstead v. Dickson*, 20 Ill. 195.

LIBHART v. WOOD.

[1 WATTS AND SERGEANT, 265.]

SERVANT DISCHARGED FOR MISCONDUCT can not recover his wages.

SERVANT ON PACKET-BOAT FORFEITS WAGES BY STEALING GOODS of a passenger on the boat during his term of service.

ERROR to Dauphin county common pleas, in assumpsit to recover wages alleged to be due the plaintiff for seven months' service as a hand on the defendant's packet-boat on the canal. The defense was, that the plaintiff, during the term for which he was employed, stole certain goods from the trunk of a passenger on board the boat, for which he was arrested and convicted. The plaintiff was employed for the season, on March 26, and was arrested for the crime in question on November 4. His duty on the night of the larceny was to guard the boat. The boats stopped running November 17. There was testimony that all the defendant's hands were arrested for the larceny. The boat made two or three trips after the theft. The court below instructed against the defense, and held the plaintiff entitled to recover, deducting any legal offsets which the defendant might have. The defendant excepted to the charge, and, after verdict and judgment for the plaintiff, brought error.

Adams, for the plaintiff in error.

J. A. Fisher, for the defendant in error.

By Court, ROGERS, J. When a servant, who has engaged for a certain time at certain wages, is turned away by his master before the period for which he has engaged to serve has expired, and his dismissal be in consequence of his own misconduct, he will be entitled to no wages; for his faithful service is a condition precedent to his right to wages, and that condition, in the case supposed, he has not performed. But if his dismissal be unjust, the master can not, by his wrongful discharge, prevent the servant from recovering a compensation for his services. Thus the law carefully protects the rights of both master and servant: 19 Eng. Com. L. 346;¹ 3 Id. 339; 25 Id. 257.² In the case at bar, the hiring was for the season, at the rate of twenty dollars per month, and although, in one sense, it may not be thought a hiring for a certain time, yet it can not be disputed, that it falls within the reason of the principles stated. By the contract, the servant agrees to serve his master faithfully for that period of time, although the termination of it may be longer or shorter, as the weather may be more or less severe. It is an express contract, but no difference is perceived between an express or implied contract; in either case it is open to the defendant, by way of defense, to insist that the plaintiff has failed to comply with his agreement. Nor is there that want of mutuality in the contract, which, as is supposed, can interfere

1. *Atkin v. Acton*, 19 Eng. Com. L. 478; 4 O. & P. 208.

2. *Turner v. Robinson*.

with the defense. Both parties are bound by it. It can not affect the case, that it is part of the agreement that the master may at any time discharge the servant, unless a corresponding right to leave his service is reserved to the servant. Nor would it, I apprehend, even then prevent the enforcement of a penalty for willful misconduct: public utility requires that the rule should be strictly observed. It must be admitted, that whether the servant be dismissed by his master for good cause, or he incapacitates himself from performing his part of the contract, as was the case here, can make no manner of difference in the application of the rule. The learned judge seems to suppose that there is a distinction between a larceny committed of the goods of the employer, and a stranger. But we do not feel the force of the distinction, nor can we perceive that the defense fails because the defendant omitted to prove that he sustained direct injury from the misconduct of the plaintiff. There is good sense in the observations of Lord Tenterden, Chit. Gen. Prac. 81, that if a servant habitually embezzled his master's property, the amount embezzled is wholly immaterial; and although the amount of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything. It may be impossible to ascertain the amount of injury a common carrier or innkeeper may sustain from the unfaithful conduct of his servant, and therefore no direct proof of it ought to be required. It is often, from its nature, not susceptible of such proof. An injury, in the case of an innkeeper or common carrier, is inevitable, where he is so unfortunate as to employ dishonest servants; it must affect his business or the character of his house, although it may be impossible to show the extent of the injury. It is nothing, therefore, that in this particular case, the goods stolen were restored. Indeed, here there was a direct injury to the master, as, for one trip at least, he was deprived of the services of all his hands, in consequence of the dishonesty of the plaintiff. And who can say, and particularly in the business in which the defendant was engaged, that the services of a dishonest servant are worth anything, or who would knowingly employ such a servant? His services, in the apprehension of every person, are worse than useless. In addition, the rule which deprives them of wages for improper conduct, has this recommendation, that it operates as an incentive to a faithful discharge of duty. It is a narrow view of the question, to suppose that it is intended for the benefit of the master alone. There are other considerations which enter into the subject, of

a still higher nature. It contributes to the security of travelers, who are compelled to intrust their property to the custody of others. The intercourse between the different sections of our extensive empire is so great, that sound policy requires that every possible protection should be extended to them; and so far from believing that the defendant is offending against any principle of ethics, in retaining the wages of his unfaithful servant, in my judgment, he is discharging a duty, which he alike owes to himself and the public. We do not wish to extend the principle so far, as to forfeit wages already earned, on a contract which is at an end. But when the contract is entire, and we conceive this to be a case of that description, although it may be for payment of wages monthly, he precludes himself from recovering the arrearages of his wages, when he is guilty of embezzlement or pillage, either from the master or a stranger. It may be unnecessary to add, that the same rule extends to common carriers, whether of passengers or goods, and to innkeepers.

Judgment reversed, and a *venire de novo* awarded.

SERVANT ABANDONING MASTER'S SERVICE without the latter's fault, where he has stipulated to serve a specific term for an entire sum or for a certain sum per month, can not recover anything for his services: *McMillan v. Vanderlip*, 7 Am. Dec. 299; *Stark v. Parker*, 13 Id. 425; *Byrd v. Boyd*, 17 Id. 740; *Wright v. Turner*, 18 Id. 35. See, also, *Sickels v. Pattison*, 28 Id. 527. To the point that faithful service is a condition precedent to a servant's right to wages, and that where there is any misconduct inconsistent with the relation of master and servant, the former has an undoubted right at any time to put an end to the contract, the principal case is cited and followed in *Singer v. McCormick*, 4 Watts & S. 267. That was a case where the bookkeeper for a firm was discharged for making certain erasures in the books of the firm by direction of one of the partners, in a private account between himself and his copartner, and it was held that he was not entitled to wages.

GORDON v. HUTCHINSON.

[1 WATTS AND SERGEANT, 285.]

WAGONER CARRYING GOODS FOR HIRE IS COMMON CARRIER, though that is not his principal business, but only an occasional and incidental employment.

ERROR to Centre county common pleas in an action of assumpsit for the loss of certain goods which the defendant was hauling for the plaintiff. It appeared that the defendant was a farmer, and was going to Bellefonte with a load, and applied to the plaintiff for the hauling of a load of goods for him on the return

trip, and received an order to do so. The question was whether he was liable as a common carrier or only for negligence. The court below held him liable as a common carrier. Verdict and judgment accordingly, and the defendant brought error.

Blanchard, for the plaintiff in error.

Hale, for the defendant in error.

By Court, GIBSON, C. J. The best definition of a common carrier in its application to the business of this country, is that which Mr. Jeremy (Law of Carriers, 4) has taken from *Gisbourn v. Hurst*, 1 Salk. 249, which was the case of one who was at first not thought to be a common carrier only because he had, for some small time before, brought cheese to London, and taken such goods as he could get to carry back into the country at a reasonable price; but the goods having been distrained for the rent of a barn into which he had put his wagon for safe-keeping, it was finally resolved that any man undertaking to carry the goods of all persons indifferently, is, as to exemption from distress, a common carrier. Mr. Justice Story has cited this case (Com. on Bailm. 322) to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*. My conclusion from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true the court went no further than to say the wagoner was a common carrier as to the privilege of exemption from distress; but his contract was held not to be a private undertaking as the court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier: indeed they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent, 2 Com. 597, states the law on the authority of *Robinson v. Dunmore*, 2 Bos. & Pul. 416, to be that a carrier for hire in a particular case not exercising the business of a common carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story, Com. on Bailm. 298, as well as the learned annotator on Sir William Jones' essay, Law of Bailm. 103 d, note 3, does the same on the authority of the

same case. There, however, the defendant was held liable on a special contract of warranty, that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges, indeed, said that he was not a common carrier, but one who had put himself in the case of a common carrier by his agreement; yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not, therefore, did not necessarily enter into the inquiry, and we can not suppose the judges gave it their principal attention.

But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly, than for the wagoners to lie by in Philadelphia for a rise of wages. In England, the obligation to carry at request upon the carrier's particular route, is the criterion of the profession, but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle we could have had no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania wagoner was not always such, even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburgh or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance, or in the equipment of their teams, from carriers by profession. I can

readily understand why a carpenter, encouraged by an employer to undertake the job of a cabinet-maker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer, taking his horses from the plow to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner, soliciting the employment of a common carrier, shall be prevented by the nature of any other employment he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him—there was nothing special in the case—on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but independent of that, we are of opinion that he is liable as an insurer.

Judgment affirmed.

COMMON CARRIERS, WHO LIABLE AS: See *Crosby v. Fitch*, 31 Am. Dec. 745, and the note thereto citing previous cases in this series on that subject. See also *McClure v. Richardson*, 33 Id. 105, and *Babcock v. Herbert*, *post*. That one who undertakes to carry goods for hire, though that is not his direct or principal business, is a point to which *Gordon v. Hutchinson* is cited in *Chouteaux v. Leech*, 18 Pa. St. 231. It is cited also generally in discussing the question as to who are to be deemed common carriers, in *Leonard v. Hendrickson*, Id. 43.

FOULK v. MCFARLANE.

[1 WATTS AND SERGEANT, 297.]

FRAUDULENT PURCHASER AT EXECUTION SALE gets no title as against a purchaser at a subsequent execution sale on another judgment against the same debtor, although a part of the proceeds of the first sale was applied by order of the court to the latter judgment, the owner thereof being innocent of any participation in the fraud.

ERROR to Cumberland county common pleas in an action of ejectment brought by McFarlane against Foulk and Burkholder. The plaintiff claimed as purchaser of the land at a sale on execution on a judgment against Foulk in favor of one Johnston Moore. The defendant Burkholder claimed as purchaser under a prior execution sale on another judgment against Foulk. The plaintiff claimed and introduced evidence tending to show that the sale to the defendant was the result of a fraudulent conspiracy between the purchaser and the execution debtor to prevent the attendance of bidders. It appeared, however, that the surplus proceeds of the first sale, after paying the judgment under which it was made, was applied by the court to Moore's judgment, and the defendants claimed that by receiving the money Moore was estopped from again levying upon and selling the land, and that the plaintiff, as purchaser at Moore's sale, was also estopped. The court below thought otherwise. Verdict and judgment for the plaintiff, and the defendants brought error.

Biddle and Reed, for the plaintiffs in error.

Watts, for the defendant in error.

By Court, **SERGEANT, J.** The appellant contends that the first sheriff's sale, though effected by the collusion of the purchaser with the defendant, was only voidable and not absolutely null and void, and that Johnston Moore, having elected as judgment creditor, to receive his proportion of the proceeds of sale, is thereby estopped from treating that sale as void, and proceeding against the land in the hands of the purchaser.

Whether the sale is to be termed absolutely null and void to all intents and purposes, or only void as respects Moore, in case he determine so to treat it, can be of little importance in the ascertainment of the rights of the parties. In either case, it ceases to be an obstacle in his way. The real question is, whether he has, by the receipt of the money, precluded himself from asserting his claim against the land. It must be admitted that had Moore been in any way connected with the alleged fraud, it would have barred him. That, however, is not pretended: he received the money under an appropriation by law to his use, innocently, and even ignorantly of the transaction, so far as appears. There could be no *mala fides* in his thus receiving the money. He never could be compelled to refund it. It was awarded to him by the acts of others, over which he exercised no control. I do not think, therefore, his receiving the

money, under these circumstances, can be considered as an election, or set up as an estoppel against following the land into the hands of a fraudulent vendee for the purpose of realizing the balances due to him, though, as in *Stroble v. Smith*, 8 Watts, 280, it might cure irregularity in the proceedings where there is no fraud. The fraudulent vendee gains no title to the land by the sale, nor interest in it, notwithstanding an innocent creditor may, by that very sale, obtain a good title to the money. It shall be a good sale as to the creditor, to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit. Nor would the policy of the law, which abhors fraud, be promoted by permitting such a defense to the purchaser. All the avenues that facilitate the detection and overthrow of fraud, should be kept open and free from the interposition of bars and estoppels. The doctrine in *Gilbert v. Hoffman*, 2 Id. 66 [26 Am. Dec. 103], goes to the full extent of the present case, in deciding that a sale effected by actual fraud is as no sale, and can produce no legal effect on innocent persons.

Judgment affirmed.

FRAUDULENT PURCHASE AT SHERIFF'S SALE: See *Farr v. Sims*, 24 Am. Dec. 396; *Crary v. Sprague*, 27 Id. 110; *Den v. Graham*, Id. 228; *McMeekin v. Edmonds*, 26 Id. 203; *Floyd v. Goodwin*, 29 Id. 130, and cases cited in the notes thereto. In *Martin v. Gernandt*, 19 Pa. St. 129, the principal case is cited as authority for the doctrine that no title can be acquired "by a trick in a sale even on an unexceptionable judgment." It is cited also and distinguished in *Porter v. McGinnis*, 6 Watts & S. 504, where it was held that where a party in good faith gave notice at a sheriff's sale that the land to be sold was his, and that the defendant had no title, and then bought the land himself, he was not estopped from setting up the title so acquired.

RECEIPT OF PROCEEDS OF SALE DOES NOT ESTOP ONE FROM DISPUTING the validity of such sale, when: See *Wood v. Jackson*, 22 Am. Dec. 603.

BITZER v. SHUNK.

[1 WATTS AND SERGEANT, 340.]

CONFESSION OF JUDGMENT BY ONE PARTNER BINDS HIM, but not his co-partner.

ERROR to Dauphin county common pleas. The case was: Joseph Bauman, defendant, who was a partner in business with Christian Shunk, defendant, made a certain note payable to the order of the said Shunk, which was indorsed by the latter and also by the plaintiffs, and was discounted by certain other parties, and

the proceeds applied to the benefit of the defendants' firm. To indemnify the plaintiffs as indorsers of the said note, the said Bauman, in an amicable action in favor of the plaintiffs and against the said Bauman and Shunk, confessed judgment in favor of the plaintiffs for the amount of the said note. On the affidavit of Shunk this judgment was set aside as void as to both Bauman and Shunk, on the ground that a partner had no authority to confess judgment, and the plaintiffs brought error.

Devor, in propria persona, for the plaintiffs in error.

McCormick, contra.

By Court, KENNEDY, J. We think the court below were right in deciding that the written authority given by Joseph Bauman alone, to enter an amicable action therein, and confess a judgment against himself and his copartner, Christian Shunk, in favor of the plaintiffs, was not sufficient for that purpose. But we are of opinion that the court erred in setting the judgment aside as against both on that ground. It was, undoubtedly, a good reason for setting the judgment aside, or vacating it, as against Shunk, but not as against Bauman. And what makes this still more clear here, is, that Bauman does not object to the judgment remaining against him alone. Nor could he do so with any propriety, because he had most unquestionably a right to authorize the confession of the judgment against himself, and the circumstance of his not having a power from Shunk to join him in the confession, furnishes no reason whatever, why the confession of the judgment should not be good and binding as such, against himself. If he had executed a deed in the name of both, without any authority from Shunk to do so, it would not be pretended that such deed was not binding upon himself, as his deed alone, though it could not be considered the deed of Shunk. The object and design of entering the judgment is admitted to have been perfectly honest and fair; but as no special authority was given by Shunk to Bauman, to confess or authorize the confession of a joint judgment against them both, and as no general authority to that effect could be implied, because it was wholly unnecessary that the one partner should have such an authority from the other for the purpose of carrying on and transacting the business of their partnership, the judgment was consequently improperly entered against Shunk; but upon no principle of justice can it be said to be so as against Bauman. The only objection is one of form at most; which is, that Shunk ought not to have been joined in it, but

that it ought to have been entered against Bauman solely. But it is clear that it does not lie in the mouth of Bauman to make this objection against the judgment, even if he were disposed to do so, because he was himself the cause of it; and in the next place, it is not an error that does him any injury. Shunk alone is the one who has the right to object to it, as he was joined in it without his consent, or any authority given by him for that purpose; but he at most can not ask anything more than that the judgment be vacated as to him, or his name stricken from the record of it. This is all, we think, that the court below ought to have done, as the application to them was not to be regarded in the nature of a writ of error, but as a motion made to the court, for the purpose of having the judgment corrected according to the authority under which it was entered. For this course, instead of setting the judgment aside altogether, they had the authority of the case of *Motteux v. St. Aubin*, 2 Bl. 1133, and *Gerard v. Basse*, 1 Dall. 119 [1 Am. Dec. 226]. The order, made by the court below, setting the judgment aside, is therefore reversed, and the name of Christian Shunk is ordered to be stricken out of the judgment, and the record of it, so that there shall remain a judgment against Joseph Bauman alone.

Judgment accordingly.

PARTNER CAN NOT BIND COPARTNER BY CONFESSION OF JUDGMENT: *Elliott v. Holbrook*, 33 Ala. 665, citing the principal case. But it is held in *Paxon v. Beans*, 3 Phila. 433, that upon a judgment confessed by one partner for a partnership debt the interest of the other partner in the goods of the firm can be as effectually sold as if he were a party to the judgment; though the judgment would not be allowed to disturb the equities of the partners to have the joint effects applied to the partnership debts. Referring to the principal case, the court say: "What, then, becomes of the principle of *Bitzer v. Shunk*, 1 Watts & S. 340, that a partner has no right to bind his copartner by a confession of judgment against the firm, and that such judgment will only bind the partner who gave it, and be void as to the other? The answer is given by Chief Justice Gibson in *Harper v. Fox*, 7 Id. 143, "because it [such judgment] would bind the persons and separate estates of the members, and thus transcend the limits of partnership authority, which does not allow him to dispose of other than the joint effects by his separate act."

EFFECT OF JUDGMENT, VOID AS TO ONE OF THE PARTIES THERETO: See *St. John v. Holmes*, 32 Am. Dec. 603, and note.

GRAFFIUS v. TOTTENHAM.

[1 WATTS AND SERGEANT, 438.]

ENTRY BY ONE OF SEVERAL CO-HEIRS OF ONE DYING IN ADVERSE POSSESSION of land, immediately upon the ancestor's death, inures to the benefit of all the heirs, and where he conveys to a stranger who enters and remains in possession until the completion of the statutory period after the original entry by the ancestor, the adverse possession is thereby continued and gives a good title under the statute of limitations.

WARRANT-HOLDER IS NOT ESTOPPED TO SET UP TITLE UNDER STATUTE OF LIMITATIONS in an ejectment suit by the holder of a prior warrant, by the fact that his application fixes the commencement of his improvement within the statutory period, where his actual adverse possession began a sufficient length of time before the date so fixed.

ERROR to Clinton county common pleas, in an action of ejectment for certain land. The plaintiffs exhibited a perfect paper title under a warrant granted in 1793, and the defendants set up a title under the statute of limitations. The facts were that one Edmund Huff took possession of the land in 1816, and died in possession in 1819; that his widow and children remained in possession until the widow's death, in 1820; that James Huff, one of the children and heirs of Edmund Huff, went into possession immediately after his mother's death, and continued in possession until April, 1830, when he conveyed to the defendants, who have been in possession ever since. The plaintiffs, however, claimed that the defendants were estopped from setting up any possession prior to March, 1820, because in August, 1830, they applied for and obtained a warrant for a tract including the land in controversy, and proved by their grantor, James Huff, that the improvement on the premises was commenced in March, 1820. The court below instructed the jury that the defendants were not estopped by that fact from setting up title under the statute of limitations, if they could show an adverse possession since 1816 in themselves and those under whom they claimed, and that for the purpose of making out such adverse possession they could tack their own possession and that of James Huff and his mother to the original possession of Edmund Huff, if the jury were satisfied of the truth of the facts above stated. Verdict and judgment for the defendants, and the plaintiffs sued out this writ, alleging error in the instructions.

Armstrong, for the plaintiffs in error.

Campbell, for the defendants in error.

By Court, GIBSON, C. J. Though there is no inherent privity between trespassers, it was held, in *Overfield v. Christie*, 7 Serg. & R. 177, that a tortious possession may, by our law, be transferred by deed or will so as to complete the bar of the statute of limitations, by the additional adverse possession of the transferee; and such possession is transmissible by descent, even according to the English law. Did James Huff then succeed, by his entry, to the whole of his father's adverse possession, or only to an undivided share of it? He came in at the death of his mother, who had kept the family together on the place for less than a year after his father's death. It is not denied that, as a tenant in common with his brothers and sisters, he succeeded to so much of his father's possession as appertained to his own share, but it is denied that he succeeded to any more of it; and as it was not shown that the brothers and sisters had entered for themselves, it is argued that there was no actual possession of their shares in them to displace the constructive possession of the lawful owners, and that the statute consequently ceased to run in favor of their undivided interests; but that, in any event, as James did not succeed to them by deed or will, he could not, on the principle of want of privity among trespassers, tack his adverse possession to that of his father for more than his own share.

His entry merely would certainly not be an abatement of the shares of his brothers and sisters. That principle is distinctly asserted in *Sharrington v. Stratton*, Plowd. 306, where it is stated that, "if the father dies seised of the land, and the youngest son enters, the oldest son shall not have an assize of *mort d'ancestor*, or a writ of right, or any other action against him; for the law presumes that he who is so near to him in blood is also as near to him in love, and therefore it can not be supposed that he entered as an enemy, but as a friend, to preserve the inheritance in his absence." Without more, then, the law would presume that James had entered, not to abate the shares of his brothers and sisters, but to preserve them for their use; and his entry being consequently theirs, there would be privity enough between them to unite every part of his possession to that of their common ancestor. It would presume that he was in possession without wrong to them; and as the possession of one joint tenant was deemed, in *Ford v. Grey*, Salk. 285, to be the possession of the other, so far as to prevent the statute of limitations from running against either—a consequence attributed, in *Carothers v. Dunning*, 3 Serg. & R. 381, to such a possession

between tenants in common—the possession of James would be the possession of all the rest, to give the statute entire effect in their favor.

Thus would stand his entry, unaffected by his subsequent conveyance to the defendants, which, however, serves not to weaken the case. The English law, in regard to parceners, is laid down by Lord Coke: 1 Inst. 374 a, where he says that when “the one sister entereth into the whole, the possession being void (vacant) and maketh a feoffment in fee, the act subsequent doth so explain the entry precedent into the whole, that now, by construction of law, she was only seised of the whole; and this feoffment can be no disseisin, nor any abatement, because they both made but one heir to the ancestor, and one freehold and inheritance descended to them.” Now, though the children of an intestate decedent have not, with us, an entirety of interest as in joint tenancy, or even a unity of interest as in coparcenery, but, by the words of our statute, a severalty of interest as in tenancy in common, yet we must respect our own usages which attach consequences to particular acts in the completion of an inchoate title, which would not be attached to them in the parent country. In Pennsylvania, the name in a warrant has been considered a very slight indication of the ownership of it. It was a common practice to use the name of a stranger without consulting him; and almost any act of ownership, in the prosecution of the title, was considered *prima facie* evidence of a trust for him who performed it. “We know,” said Mr. Justice Yeates, in *Cox v. Grant*, 1 Yeates, 166, “that in general the name in the location was merely nominal, and used as a kind of scaffolding for the building up of a formal and regular title;” and this practice received peculiar indulgence between those who stood in the relation of parent and child. “In the case of a father making an application in the name of his children,” said Mr. Justice Smith, in *Fogler v. Evig*, 2 Yeates, 120, “it shall be presumed to be for the use of the father.” Why shall it not equally be presumed to be for the use of the father’s heirs, when made on the foundation of his improvement in the name of one of his sons? Nothing is more usual, in such a case, than for the oldest, or some other son to enter and consummate the improvement for the use of the family, by a warrant and survey in his own name; and to convey the legal title to a purchaser, when the land is turned into money for purposes of partition. To imply a disseisin, or an abatement from the conveyance of such a warranty, would be to imply a tort, against the truth of the case, to the persons

intended to be benefited by it; and such an implication would, in this instance, do them a substantial injury by means of a constructive wrong. It may be said, that if the warrant was taken out for the use of the family, it might have been proved. These arrangements, however, usually take place upon an indistinct understanding, and without any specific agreement; so that it is difficult to prove them by the testimony of the family, even when they are competent witnesses on the score of interest. It would be dangerous, therefore, to imply an ouster of the rest of the family from a conveyance by one of the sons in his own name; and it is much more safe to apply the principle of *Fogler v. Evig* to such a transaction, wherever the presumption is not rebutted.

I have treated the case as if James Huff had taken out the warrant in his own name before the conveyance; but it is certainly not the weaker because it was taken out in the name of his vendee.

Another objection has been urged, which would preclude defense on the statute of limitations altogether. This ejectment was brought in February, 1840, and the commencement of the settlement is stated in the application to have been in October, 1820; so that if the beginning of the adverse possession may not be carried further back, the intervening time will be too short. The disability incurred from misrepresenting the commencement of an improvement has never been extended further than to preclude the party from carrying back the commencement of his improvement title beyond the day specified. It was said by Chief Justice Tilghman, in *Ewing v. McKnight*, 1 Serg. & R. 131, "that when one derives title under a warrant, he is estopped from carrying his title (under the warrant) further back than the time fixed by the warrant for the calculation of interest." "The warrant-holder," it was said in *Nicholls v. Lafferty*, 3 Yeates, 272, "has precluded himself from deriving his equitable improvement beyond the day called for in the warrant." It was not said that he should not set up a subsequently acquired title which had been adverse to his own; and what else is a title acquired by the statute of limitations, which, according to *Pederick v. Searle*, 5 Serg. & R. 240, transfers, to the adverse occupant, the title against which it has run. To give evidence of adverse possession is not to carry back title by the statute of limitations to the beginning of it; for the statute is not maturing an inchoate title while it is running its course against an adverse one. The title of the original owner is un-

affected and untrammelled till the last moment; and when it is vested in the adverse occupant by the completion of the statutory bar, the transfer has relation to nothing which preceded it: the instant of conception is the instant of birth. But the chief justice further said in *Ewing v. McKnight*: "It was his (the applicant's) duty to tell the truth when he took out his warrant; but if he told a falsehood, with a view of defrauding the proprietaries, it was but justice that he should be bound by his own assertion on all future occasions." This is a most righteous principle, but it is inapplicable to the case before us; for it is one thing to allege a possession by settlement and cultivation as the foundation of an improvement title, and another to allege an adverse possession by inclosure, or cultivation, without residence, to gain a different title by the statute of limitations: and it is certainly no reason that because the applicant has defrauded the commonwealth, he shall not be at liberty to assert a title against any one else. The consequence of such a fraud is an estoppel, not a forfeiture of the land. In proving an earlier adverse possession, the defendants proved an earlier improvement along with it; but that this was immaterial, is shown by *Coxe v. Ewing*, 4 Yeates, 431, in which it was ruled that though an improvement can not be carried back to establish a title anterior to the time specified in the application, yet the evidence of it may be received to show that the survey of the other party could not legally take effect. "If it included the *bona fide* settlement of third persons," said Mr. Justice Yeates, "it could not have received the sanction of the land office, or of the country, from their uniform usages. It is true that by going into the testimony, the defendants will receive a degree of benefit from improvements, the equity of which they seem to have abandoned; but this appears inevitable, and flows as a necessary consequence from the investigation of the validity of the survey made for the plaintiffs. Thus all the cases go upon the ground that a fraud in this particular is a relinquishment of the equity of an earlier improvement; but a title by the statute of limitations is not founded on an equity: it is purely legal. The principle of *Coxe v. Ewing* was reasserted in *Wells v. Wright*, 3 Wash. 250, in which it was ruled that though a party can not set up title by settlement prior to the day stated in his warrant for its commencement, he may nevertheless give evidence of an earlier settlement for the purpose of contesting a settlement right claimed on the other side. These two cases prove the rule to be that the applicant shall not go further back for the

origin of his own title than the day assigned to it in his warrant or application, but that he may do so to affect the adverse title of another; and in that aspect, the evidence of an earlier adverse possession was competent and conclusive.

Judgment affirmed.

ENTRY BY ONE OF SEVERAL CO-HEIRS OF ADVERSE OCCUPANT, EFFECT OF: See *Watson v. Gregg*, 36 Am. Dec. 176 and note.

“TACKING” SUCCESSIVE POSSESSIONS to make out title by adverse possession: See *Innis v. Miller*, 13 Am. Dec. 330, and the note thereto, in which this subject is discussed.

CRAIG v. DALE.

[1 WATTS AND SERGEANT, 509.]

TENANT IS ENTITLED TO REMOVE WAY-GOING CROP, INCLUDING THE STRAW as well as the grain, on quitting the premises at the expiration of his term.

ERROR to Northumberland county common pleas, in an action of trover to recover the value of certain straw. The facts were, that the defendant had been a tenant of a certain farm of the plaintiff, and at the expiration of his lease had taken away the way-going crop, including the straw and grain, on quitting the premises. The plaintiff contended that he had no right to remove the straw. The court left it to the jury to determine what the custom was in that respect. Verdict and judgment for the plaintiff, and the plaintiff sued out this writ, assigning error in the instructions.

Miller and Slenker, for the plaintiff in error.

Greenough, for the defendant in error.

By Court, KENNEDY, J. A number of errors have been assigned in this case, which it is unnecessary to notice in detail, as the court below erred in their instruction to the jury on the subject of the way-going crop and of what it consisted, and we think that the correction of their error in this respect will determine the whole case in favor of the plaintiffs in error, who were the defendants in the court below. The court on this matter charged the jury, that notwithstanding the tenant was entitled, in Pennsylvania, to the way-going crop, according to the custom thereof, or law thereof, they ought rather to have said, yet it depended upon the general custom or practice which prevailed among landlords and their tenants, whether the straw was included or not in the way-going crop; and accordingly re-

ferred this question to the jury as one of fact, to be decided by them from the evidence which had been given in relation to it. Now we are decidedly of opinion, that the straw is a constituent part of the way-going crop; for it is just as much a part of the annual product arising entirely from the labor of the tenant as the grain itself, and being of real value to the tenant, and frequently indispensably necessary for the support of his cattle, which he can not possibly do without, more than he can the grain raised by him, there is just the same reason why he should have all the benefit to be derived from it, that there is for his having a right to take the grain, in order that he may make all the profit he can out of it, either by giving it to his cattle, or disposing of it otherwise, as he shall think best. It is not essentially necessary that the straw grown upon a farm should be used or retained upon it, for the purpose of keeping it in the same productive state, and preventing it from becoming worse; because the soil of any farm may even be improved and rendered more fertile by keeping it in grass and permitting it to lie fallow a reasonable portion of the time, without using or leaving any of the straw upon it. And frequently a farm, while in this state, by using it for the purpose of feeding and grazing cattle, may be made productive of greater profit to the tenant, as also of value to the landlord, than by growing grain upon it the most of the time with the aid of all the straw belonging to it. This is putting it in a state of rest from cultivation, which land requires in order to render it very productive even of grain; and all the straw or manure that can be made from it and applied to the land will not supply the want of seasonable rest. The straw is a subject of merchandise also, as well as the grain, and why should not the tenant, when he pays a rent to the owner of the land, equal to the annual value of it, have the full benefit of the straw for this purpose if he chooses? Farmers who till their own lands do not always consider it essentially necessary that the straw grown thereon should be applied, in some form or other, for the purpose of improving the soil; for they frequently make merchandise of it by selling it; and why should they, in case they let their lands to tenants for full rents, receive the rents from them, and make profit beside out of the product of their labor by taking from them the straw and selling it? Distributive justice, in such case, would seem to give the straw as well as the grain to the tenant, as part of the way-going crop, to be taken and disposed of by him, as he pleases, seeing it is the product of his own labor; from the land of his lessor, to be

sure, but then he has paid the lessor a full compensation for the use of the land. If the tenant can not have the straw as a part of the way-going crop, because it would be an injury to the farm to remove it therefrom; for the like reason he would not be permitted, while he remained in the possession of the farm under his lease, to remove therefrom any of the hay made by him on it, for the purpose of selling or using it in any way off the farm; because it would be quite of as much benefit to the farm, if not much greater, to use the hay made from it by feeding it to cattle thereon. And even an additional reason seems to exist against the tenant's removing the hay, that does not exist in the case of the straw; which is this, that the grass, of which the hay is made, is often not the product of the labor of the tenant, either in part or in whole, whereas the straw always is; yet I apprehend that no person of ordinary experience throughout the state would attempt to question the right of the tenant to dispose of the hay made by him on the farm as he pleases, unless he be expressly restrained from doing so by the terms of his lease. This he may be, because it is competent for the parties, by their agreement in this behalf, to make a law for themselves. If the landlord, therefore, does not wish that any of the straw or hay grown and made on the leased premises should be removed from them, he ought to make his wish, in this respect, known to the tenant at the time of treating for the lease, so that the tenant may be enabled to meet it by not agreeing to give as much rent as otherwise he would do. If the lease be reduced into writing, whatever is finally agreed on between them, as to either the hay or the straw not being taken or removed from the leased premises, ought to be inserted in the writing, otherwise the tenant will be entitled to dispose of them as he pleases. The court below were, therefore, wrong in submitting it to the jury to be determined by them, as a question of fact, whether the straw formed a part of the way-going crop or not. Besides, the testimony showed that it ought not to have been left to the jury as a question of fact. For if it proved anything at all, it was that the general practice, as well as the general understanding, was that the tenant had a right to remove the straw; or at most, that there was no general practice or custom, either in favor of or against his exercising such right. Two witnesses only were produced on the part of the plaintiff below, Peter Pursel and Samuel McMackin. The first of these testified that he believed it was the custom for tenants to leave the straw of the way-going crop, but he had known instances of tenants hauling off both the grain and

the straw. The second, after stating that he was ignorant as to the point, that he never paid any attention to it, said, it is generally understood tenants should leave the straw and such things on the ground. Three witnesses, however, were adduced on behalf of the tenant or defendant below, James Shearer, George Newcomer, and Joseph Campbell. The first of them testified that he had had land farmed, and when the straw was not excepted in the lease, it had been the general custom, so far as he knew, for tenants to take the straw where they pleased; that it was generally mentioned in the lease; that he had not seen a lease where the straw was not reserved.

The second of them testified that he had known several instances of tenants taking the grain in the straw to adjoining farms. The third witness testified that he had known grain to be taken off in the straw: did not know it to be customary, but knew it to be done. So far, therefore, as regards the number of witnesses brought forward by the parties on this point, it would rather seem to have been in favor of the tenant's side of the question. But surely, it could be little else than absurd, to say that a general custom could be established by such conflicting testimony. Such a thing can not obtain generally without being generally known; and if so, witnesses would concur in their testimony, showing that it was so. But even supposing all the witnesses to have concurred in opinion that the general custom or practice was, so far as they had any knowledge of it, for the tenant to leave the straw of the way-going crop on the land where it grew, it would still have been worse, if possible, to have determined from their evidence, that such was the general custom and practice throughout the whole state; when the witnesses have given no evidence whatever of their having any knowledge on the subject extending to the whole state; but on the contrary, show clearly that their knowledge, at the utmost, only extends to the neighborhood of their residence. If such evidence were to be held sufficient to establish a custom or usage on the subject, it is evident that the custom might be different not only in different counties of the state, but different in different parts of the same county, without its being possible to set any fixed bounds or limits to it; and hence would arise a state of uncertainty, incapable of being settled, that would prove a source of endless litigation. We are therefore, of opinion, that the question which the court submitted to the jury to be decided by them as one of fact, was a question of law, which the court ought to have decided itself; and in doing so to have instructed

the jury that the straw was a part of the way-going crop, and being so, the tenant had a right to remove it as well as the grain; and, consequently, the plaintiff below was not entitled to recover.

Judgment reversed.

TENANT'S RIGHT TO WAY-GROWING CROP: See *Van Doren v. Everitt*, 8 Am. Dec. 615. But see, on the other hand, *Harris v. Carson*, 30 Id. 510. In *Rank v. Rank*, 5 Pa. St. 213, the foregoing case is referred to as authority for the point therein decided, that straw is a part of the way-going crop. In *Iddings v. Nagle*, 2 Watts & S. 22, it is held that the question as to whether or not a tenant is entitled to the straw which grew upon the land, depends upon the terms of the contract; and the principal case is cited as one in which the diversity of opinion among the witnesses showed how impossible it would be to administer justice with any degree of certainty if the right to the straw were left to be decided by the custom proved in each case.

OWEN v. HENMAN.

[1 WATTS AND SERGEANT, 548.]

MEMBER OF CHURCH CAN NOT MAINTAIN ACTION AGAINST ONE DISTURBING him in his devotions there, by making loud noises in talking, singing, and the like.

ERROR to Bradford common pleas, in an action on the case brought by the plaintiff against the defendants to recover damages for disturbing the plaintiff by loud noises in his worship in the church of which he was a member. The substance of the declaration is stated in the opinion. The question was as to whether it set out a cause of action, and the defendants, admitting the facts to be as stated for the purposes of the action, requested the court to charge the jury that no action would lie. The court charged as requested, and the plaintiff excepted, and, after verdict and judgment for the defendants, brought the case here on writ of error.

Overton, for the plaintiff in error.

Elwell and Williston, contra.

By Court, SERGEANT, J. The questions arising in this case are on the sufficiency of the cause of action stated in the declaration, and ought properly to have been raised by a demurrer to the declaration, and not by asking the court to charge on the evidence. As, however, this course has been consented to, and the cause has been agreed to be treated as if it were a demurrer to the declaration, we shall so consider it.

The complaint in the narrative, succinctly stated, is, so far as it concerns the plaintiff, that the defendants unlawfully disturbed him in the hearing of the preaching of a clergyman in the church and building, in so ample and beneficial a manner as he might have done, by making loud noises in singing, reading, and talking, he being a member of the congregation, and having the right to sit there, and to hear divine service, and exercise religious worship therein, the said building being, according to their rules and regulations, the property of the said congregation, and used and occupied by them. Whatever rights and privileges the plaintiff may, with others, have in the building, we have no doubt there are remedies at law for the full protection of them, provided they are sought in a proper manner. But it does not, therefore, follow that he can maintain an action on the case for a disturbance such as is here laid.

In the first place, the injury alleged is not the ground of an action. He claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse, or any other mental exercise (and it must be the same whether in a church or elsewhere), by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature: it is altogether of a spiritual character, for which no action at law lies. It is settled that an action on the case does not lie when there is not any temporal damage, as against a woman who pretends herself single, and inveigles a man into a marriage, whereby he is disturbed in conscience: 1 Com. Dig. 180; 1 Lev. 247. Nor does it lie for refusing to administer the sacrament: 1 Sid. 34.¹ Nor for not reading divine service to him and the tenants of his manor: Id.; 5 Co. 73 a.² In 5 Barn. & Ald. 356; 7 Eng. Com. L. 129,³ it was decided that an action will not lie for disturbing the plaintiff in the occupation of a seat in the body of a church, though he had contributed to the making of the seats.

Indeed it is well known, that the property of our churches and meeting-houses, and the superintendence of the congregations, and the rights to control and regulate them, and to prevent improper intrusion or interference by suit or otherwise, is uniformly vested in some corporation or trustees, in whom is placed the power to enforce the conditions of the founder, or

1. *Clovell v. Cardinall*.2. *Williams' case*.3. *Mainwaring v. Giles*.

the will of the owners. It is for them, or the organized officers, to bring actions of trespass, or on the case, to regulate the affairs of the churches, and to protect the members in the enjoyment of their religious rights and property. In addition, any persons disturbing congregations are liable to indictment by the act of the second of April, 1822. The injury complained of, if against the will of the officers of the church, is in the nature of a nuisance or injury to them, and it is for them to seek redress.

Another objection to this action, springing out of similar causes, is, that if the plaintiff may maintain such an action, so may every member of the congregation present, whether males or females, adults or minors, and even sojourners attending, according to common usage. In *Williams' case*, 5 Co. 73, the plaintiff sued a clergyman for not performing divine service as he was bound to do, to the plaintiff, his servants, and tenants within the manor. It was held the action would not lie; for if it did, every of his tenants might also have his action on the case, and so infinite actions for one default. A man can not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person shall have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause: *Id.*; Co. Lit. 56 a; 1 Com. Dig. 180.

We therefore think the court below rightly determined that the cause of action set forth in the narrative was not sufficient in law to maintain the suit.

Judgment affirmed.

RANK v. HILL.

[2 WATTS AND SERGEANT, 56.]

STATUTE OF LIMITATIONS DOES NOT BAR AN ACTION UPON AN AWARD at common law, though made upon a parol submission, the award and not the submission being the proper foundation of the action in such case.

DEBT. Plaintiff sued to recover a sum of money found due upon an award made upon a parol submission to arbitrators of the unsettled debts and accounts between plaintiff and defendant. The award was dated February 22, 1834. Plea, statute of limitations. Verdict and judgment for plaintiff.

Miller, for the plaintiff in error.

Linn, contra.

By Court. An award at common law seems to be considered rather as a judgment than as an agreement of the parties made through the authorized agency of others. Yet one would suppose the submission to be an engagement to abide by what the arbitrator should direct, and a promise to perform it. The remedy, however, in a case like this, is not on the submission but on the award. Still an award so far differs from a judgment that it transfers no property and binds no right, as was held in *Hunter v. Rice*, 15 East, 100, though it has been held in *Morris v. Rosser*, 3 Id. 15, that the ascertainment of a right of property by an arbitrator pursuant to the submission, will conclude the parties. But that an action of debt lies on an award for a sum of money, and not on the submission, except for the performance of a collateral act, led to the conclusion that a debt created by award is not founded on any lending or contract; consequently that an award upon even a parol submission is not to be barred by the statute of limitations; and however doubtful this might have been on principle, it is too firmly established by *Hodsden v. Harridge*, 2 Saund. 64 b, to be questioned. It would seem, therefore, the action in this case was not barred; and the other errors are either not pressed or not maintained.

Judgment affirmed.

AN AWARD IS AS CONCLUSIVE AS A JUDGMENT: *Wernwag v. Pawling*, 25 Am. Dec. 317; and an award made upon a parol submission, if it concern title to land, is within the statute of frauds: *Stark v. Cannady*, 14 Id. 76.

THE PRINCIPAL CASE IS CITED to show that an action on an award, although made upon a parol submission, is not within the statute of limitations, in *De Haven v. Bartholomew*, 57 Pa. St. 126; *Green and Coates Streets P. R. Co. v. Moore*, 64 Id. 79.

POST v. CARMALT.

[2 WATTS AND SERGEANT, 70.]

SET-OFF—MUTUAL DEBTS DO NOT EXTINGUISH EACH OTHER PER SE unless by some positive act or agreement of the parties the intention to satisfy and discharge their respective debts is clearly indicated.

MORTGAGE DEBT IN THE HANDS OF AN ASSIGNEE OF THE MORTGAGEE is not affected by payments of money made by the mortgagor for the benefit of the mortgagee, previous to the assignment, with a general understanding that such payments were to be credited on the mortgage debt, unless by indorsement or other mode or memorandum of credits such proportion of the debt was in fact relinquished by an actual application of the sums so paid to its discharge.

ERROR. Carmalt, as assignee of Rose, brought this action upon a mortgage to the latter of certain premises owned by Post. Plea of payment. Replication, that defendants claim to a set-off on account of moneys paid was barred by the statute of limitations. Defendant gave in evidence certain payments of money to Rose, as shown by the latter's receipts, and of other payments of sums upon orders of Rose in favor of third persons. Rose testified that at the time the several payments were made there was an unsettled account between himself and Post, but that none of these specific payments were indorsed upon the note, or otherwise definitely credited or applied to the discharge of the mortgage debt. The court below held that the off-sets pleaded in payment by defendant were barred by the statute of limitations; and verdict and judgment being in favor of plaintiff, the defendant prosecuted a writ of error.

Williston, for the plaintiff in error.

Case, for the defendant.

By Court, SERGEANT, J. This case is not, in the point now discussed, placed in a situation materially different from that which it presented on the former writ of error. It is urged that the present evidence of Dr. Rose goes positively to show an agreement between him and Post, that the claims of Post should be applied in discharge of the mortgage, which the court below ought to have left to the jury; whereas, they charged that there was no evidence that could, in point of law, alter the character of these claims, and bar the operation of the statute of limitations upon them. Taking the testimony of Dr. Rose alone, and without referring to the other evidence in the case, it is, in our opinion, too loose and uncertain in its character to justify the inference that any application of these claims had been made by the joint or concurrent acts of the parties prior to the assignment of the mortgage from Rose to Carmalt, so as to preclude the assignee from insisting on the bar by lapse of time. It is settled, that mutual debts do not, *per se*, extinguish each other: *Himes v. Barnitz*, 8 Watts, 39; *Carmalt v. Post*, Id. 406. To effect such extinguishment, there must be some act of the parties, whilst mutually debtor and creditor, by which they conclusively establish that one shall go in satisfaction of the other, which act must be of binding efficacy, so as to accompany the claims into whosoever hands they may pass, and fix definitively their character, and determine whether they still subsist as debts, or become canceled and extinguished.

But all that Dr. Rose says is comprised in a line or two: that the unsettled accounts between them "were to be applied on what the defendant owed for the land." This apparently means that such was the purpose and intent of the parties, and that if either had requested the application to be made, it would not have been refused. But he does not allege that this was ever done; nor does he state that there was any positive and fixed agreement between them to that effect, which would conclude them, nor state when or where, or on what occasion such agreement was made. The design is left inchoate and incomplete, to be performed at some future day; and if before that day either party chooses to assign his claim to a third person without having effected this purpose or intent, and without any express arrangement on the subject, the assignee might well contend that what was intended to be done never was done, nor any act completed which would be equivalent in its legal operation. No particular mode of making such application, either by indorsement or settlement of accounts (though these, perhaps, would be the safest modes), is designated by law, but certainly there must be some positive and definite act or agreement by which both parties are bound, and not a floating, general intention or willingness which either may relinquish, and which he must be considered as relinquishing who assigns his claim to a third person for a valuable consideration, and without notice, as appears to have been the case; otherwise third persons would be prejudiced by latent intentions in the breast of the assignor, never executed, and never communicated to them. For these reasons, we think there was no error in the charge of the court.

Judgment affirmed.

SET-OFF.—The cases in this series upon this subject, and references to notes thereto, are collected in the note to *Chandler v. Drew*, 23 Am. Dec. 704.

COX v. LIVINGSTON.

[2 WATTS AND SERGEANT, 103.]

ATTORNEY AT LAW IS LIABLE FOR HIS NEGLIGENCE TO BRING SUIT upon a note deposited with him for collection, notwithstanding he may have honestly believed, in the exercise of his best judgment, that a suit would prove unavailing.

NOTE PLACED IN THE HANDS OF AN ATTORNEY AT LAW is presumed to be for the purpose of commencing an action thereupon for its collection, whether from his knowledge of the debtor's circumstances he may deem such action advisable and expedient or not.

MEASURE OF DAMAGES IN AN ACTION AGAINST AN ATTORNEY AT LAW for neglect to sue upon a note given him for collection, is the sum that might have been recovered of the maker if a suit had been commenced and prosecuted to judgment.

ERROR. The opinion states the facts.

Dunlop, for the plaintiff in error.

Baird, for the defendant.

By Court, KENNEDY, J. This action was instituted in the court below, by the plaintiff, against the administrators of Thomas Livingston, for a breach of his duty as an attorney at law, in not bringing a suit, agreeably to his undertaking, against Martin Dubbs, to recover a debt of between five hundred dollars and six hundred dollars, which Dubbs owed to the plaintiff upon a promissory note. According to the evidence, Mr. Livingston gave the plaintiff a receipt, dated at Pittsburgh, the thirtieth of August, 1837, in the following words: "Received of Mr. Thomas Cox, of Lancaster, Pennsylvania, for collection, a note drawn in his favor by M. Dubbs, calling for four hundred and ninety-seven dollars and sixty-five cents, payable three months after date." On the same day the plaintiff made an affidavit in support of his claim against Dubbs, before Robert Christy, esq., an alderman of the city of Pittsburgh. Mr. Livingston died in January, 1838. Shortly after his death, either in the same month, or the month following, this affidavit was found among his papers, in his office, attached to a *præcipe* made out by him in his life-time, for commencing an action in favor of the plaintiff, against Dubbs, by suing out an original writ. No suit, however, was ever commenced by Mr. Livingston, though two terms of the court elapsed, before his death, after the date of the receipt. Cox was in Pittsburgh some two or three days, at the time he put the note into the hands of Mr. Livingston for collection; and from the testimony of Dubbs himself, who was examined as a witness, on the trial, it appeared that Mr. Livingston, after he received the note, had spoken to Dubbs about paying it; that Dubbs told Mr. Livingston he had not the money then, but expected to get it shortly, and would then pay the note. Dubbs also testified that he had sufficient property then, and throughout the whole of the autumn of 1837, and perhaps the following winter, to have satisfied the debt due upon the note; and if he had been sued for it by Mr. Livingston when the latter first received the note, the debt might have been recovered from him. It did not appear, however, from the

evidence, that Cox had authorized Mr. Livingston to give any indulgence to Dubbs, or that he had consented that Mr. Livingston should exercise any discretion whatever in this respect. But there was some evidence given tending to show that it was, perhaps, somewhat doubtful whether the debt could have been recovered from Dubbs, even if he had been sued and prosecuted for it with all possible diligence by Mr. Livingston. Mr. Mahon, examined as a witness on behalf of the defendant, seemed to think that Mr. Livingston's indulgence to Dubbs, on the faith most likely of the latter's promising to get the money shortly, and pay the debt, was the most advisable course that Mr. Livingston could have taken, in order to obtain payment of it. This evidence, however, can only be regarded as conjectural, at best, as no facts are testified to that would seem to warrant the opinion. At all events, it is certain that Mr. Livingston did not succeed in getting the money from Dubbs by indulging him without bringing a suit, as it is probable he expected he would. But it may be that Mr. Livingston thought he was more likely to succeed in obtaining money soon by trusting to the promise of Dubbs to pay it, than by bringing a suit against him to enforce it. And the court below seems to have taken up the idea, that if Livingston really thought so, and forbore accordingly to bring suit under that impression, believing it was best for the interest of the plaintiff to do so, he ought to be excused for not having brought suit, although it may have been that it resulted in an injury to the plaintiff. For the court say in their charge to the jury, in speaking of the neglect of Mr. Livingston to bring a suit, that "the delay here is not such neglect as will enable the plaintiff to recover, provided the jury should believe, under the circumstances, as proven, that it was caused by the honest though mistaken exercise of Mr. Livingston's best judgment, and with a view, as he believed at the time, to the interest of his client."

Exception was taken by the counsel of the plaintiff below to the charge of the court on this point, and it has been assigned for error in this court. We are decidedly of opinion that the instruction given to the jury on this point can not be sustained; for unless the evidence, or the circumstances given in evidence, tended to prove that the plaintiff in employing Mr. Livingston as his attorney at law to collect the debt of Dubbs, left it entirely to the discretion of Mr. Livingston to bring suit or not for it, just as he might think it most advisable, in order to secure the speedy payment of the debt, it was the duty of Mr. Living-

ston to have brought suit immediately against Dubbs, and to have prosecuted it with reasonable diligence, according to the rules of the court established in that behalf, and by these means, if practicable, to have collected the debt; otherwise he acted upon his own responsibility, and made himself liable to the plaintiff, for whatever loss he may have sustained by reason of suit not having been brought and prosecuted with reasonable diligence.

But the evidence and the circumstances attending the employment of Mr. Livingston to collect the debt, tend very strongly, if not conclusively, to show that no such discretion was given by the plaintiff to Mr. Livingston; for it appears therefrom, that the plaintiff was in Pittsburgh himself at the time he placed the note in the hands of Mr. Livingston for collection, after having applied first personally to Dubbs for payment; but finding that he could not obtain it in that way himself, he then put it into the hands of Mr. Livingston for collection, as it would seem, because he was an attorney at law, for the purpose of enforcing the payment of the debt by means of a suit. This is certainly the natural inference to be drawn from the facts proven, of the plaintiff's being unable himself to obtain payment from Dubbs, and his then placing his claim immediately in the hands of an attorney at law, that he should effect the object by legal means. But this inference becomes irresistible when connected with the fact of the plaintiff's having made the affidavit as he did, at the same time that he placed his claim in the hands of Mr. Livingston, which affidavit was clearly preparatory to, and could be issued for no other purpose than that of bringing a suit to recover the debt. The jury, therefore, ought to have been instructed by the court, if they came to this conclusion, and we do not see well from the evidence how they could have avoided it, that notwithstanding they might think that Mr. Livingston had omitted to bring a suit, solely with a view to promote the interest of the plaintiff, yet he had violated his engagement with and failed to perform his duty to the plaintiff, in not having brought and prosecuted a suit with reasonable diligence for the recovery of the debt due to the plaintiff; and having thus failed to perform his duty, he had rendered himself liable to pay to the plaintiff whatever of the debt might have been recovered of Dubbs by suit having been so brought and prosecuted, which Dubbs has now become unable to pay; and that it was the duty of the jury to find a verdict in favor of the plaintiff for that sum, whatever they should think it was. But if from

the evidence they should be of opinion, that a suit brought against Dubbs would have been unavailing, and that nothing could have been recovered by means of it, their verdict, though it ought still to be for the plaintiff, should only be for nominal damages. Under this view of the case, we think that the plaintiff ought to have a new trial.

Judgment reversed, and a *venire de novo* awarded.

LIABILITY OF ATTORNEY FOR NEGLIGENCE.—The case of *Fitch v. Scott*, 34 Am. Dec. 86, involves a principle similar to that maintained in the principal case, and in the note the subject is reviewed at length.

VOORHIS v. FREEMAN.

[2 WATTS AND SERGEANT, 116.]

MACHINERY CONTAINED IN A MILL OR FACTORY IS PART OF THE REALTY, whether it is made fixed and stationary by physical means, or is detached, if it is machinery which is employed in and devoted to the business.

ACTUAL AND PERMANENT ANNEXATION TO THE FREEHOLD is necessary to give a particular article the character of a fixture in dwelling-houses; but in the case of machinery employed in the business of manufacturing, no actual physical attachment to the realty is essential.

MACHINERY WHICH IS A CONSTITUENT AND INTEGRAL PART OF A FACTORY, and necessary in order to maintain and carry on the business, is constructively attached to the building in which it is stationed, and passes as part of the freehold.

BETWEEN VENDOR AND VENDEE, HEIR AND EXECUTOR, debtor and execution creditor, such machinery is considered as a part of the freehold, although as between a tenant and the landlord or remainder-man a different principle would no doubt prevail.

SALE UNDER A LEVARI FACIAS OF A LOT OF GROUND and the iron rolling mill situated thereon, together with the apparatus, steam-engine, boilers, and bellows attached to the establishment, passes the iron rolls used in the mill, though they were not attached, but were lying loosely in the place where kept, to be used when required, and the latter can not be thereafter levied upon and sold under *fieri facias* against the former judgment debtor.

TROVER for one hundred and six soft and chilled rolls, part of the machinery of an iron rolling mill situated in the city of Pittsburgh. The defendant had purchased the property at a sheriff's sale under a writ of *levari facias* issued upon a judgment recovered upon a mortgage executed by Sample, owner of the mill and machinery. The sheriff's conveyance to the defendant described the property sold as "a lot of ground with one iron rolling mill establishment situated thereon, with the

buildings, apparatus, steam-engines, boilers, bellows, etc., attached to said establishment." The rolls in dispute in the present action were not attached to the freehold, but were lying loosely in the mill, to be used as occasion might require. The plaintiff claimed by virtue of a sale to him under a *fiery facias* upon a judgment against the mortgagor, recovered subsequently to the first sale under execution above referred to. Judgment and verdict for plaintiff.

McCandless and Biddle, for the plaintiff in error.

Craft and Loomis, for the defendant.

By Court, GIBSON, C. J. It is true we ruled in an unreported case, *Chaffee v. Stewart*, that the spindles and other unattached machinery in a cotton mill, were personal property for purpose of execution, on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but an examination of their foundation would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear bird's-eye view of it has been spread before the profession by Mr. Justice Cowen in *Walker v. Sherman*, 20 Wend. 636, from which it is evident that no distinctive principle pervades the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case, is that the court adhered to the old distinction when the question related to a woollen factory, instead of following out the principle, started by Mr. Justice Weston in *Farrar v. Stackpole*, 6 Greenl. 157 [19 Am. Dec. 201], which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and improvements of the age. By the mere force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its structure, or by what

means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal-chests, screens, scales, weights, elevators, hopper-boys, and running gears of a grist-mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such. If physical annexation were the criterion in regard to such things, the slightest tack or ligament ought to constitute it; else if we were to get away from it even ever so little, we should have no criterion at all. There are so many fashions, methods, and means of it, and so many degrees of connection between material substances, that there is nothing about which men would more readily differ than whether a thing held by a band or a cleet were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the results of the decisions professedly regulated by it. To avoid discrepancy, it would be necessary to hold the slightest fastening to be sufficient, but to exclude from the character of real property, as well everything constructively attached to it by the nature of the thing, as everything held to the ground by the attraction of gravitation. Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them, it would make havoc of the cases already decided, and indeed produce the most absurd consequences by stripping houses of their window-shutters and doors, and farms of the houses themselves.

When, therefore, we reflect on the necessary exceptions to the rule, as well as the cases of constructive attachment without the semblance of a tack or ligament, we are not surprised at the confusion and embarrassment in which we are left by the decisions. The inherent imperfections of the rule required so many exceptions to it, in order to avoid absurdity and injustice in its application, that it has almost ceased to be a rule at all. Being purely artificial, and having no regard to the purposes for which capital is invested, a rigid application of it would be ruinous to the manufacturer. In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton-spinner, for instance,

whose capital is chiefly invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels not only separately, but piecemeal. A creditor might as well be allowed to sell the works of a clock, wheel by wheel. His interest, it may be said, would forbid him to do so; but in the case of a manufactory, he would often be compelled to sell a part, or to sell many times the worth of the debt, and none but a person entering into the business would purchase either a part or the whole. The sacrifice that would be induced by either course, is incalculable; but that is not all. The bare walls of the building would be comparatively of little value. They might perhaps answer the purposes of a barn; but so might the walls of a dwelling, when deprived of their doors and windows, and why are these considered a part of a dwelling? Simply because it would be unfit for the purposes of a dwelling without them. What then is demanded in the case of a building erected for a manufactory, but an application of the same principle? Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment; and it is the principle of *Farrar v. Stackpole*, glanced at by Lord Mansfield in *Lawton v. Lawton*, 1 H. B. 259, note, who seems to have foreseen its day. I speak not here of questions between tenant and landlord or remainder-man, but of those between vendor and vendee, heir and executor, debtor and execution creditor; and between co-tenants of the inheritance. With this limitation, nothing said or done by this court, except its decision in *Chaffee v. Stewart*, already mentioned, and an *obiter* recognition of an adverse decision by the judge who delivered the opinion of the court in *Gray v. Holdship*, 17 Serg. & R. 415 [17 Am. Dec. 680], will be found to conflict with the principle proposed. Certainly nothing else ever said by us gives countenance to the notion that the rolls of an iron mill may be seized and sold as personal property.

But such rolls, being adapted to the manufacture of bars of different shapes and sizes, can not all be used at once; and according to the ordinary criterion, only those in place and fixed for use would be deemed a part of the mill. But by the criterion proposed, they must be deemed equally a part of it when unfixed to give place to others; for a rolling-mill without rollers

for all work, would be as incomplete as a hatter's shop without blocks for all heads. By this, however, I mean not to be understood as intimating that any such block is part of the realty. On the principle, then, that a thing temporarily severed from the freehold does not cease to belong to it, the whole set must be considered a part of the mill. Some two or three of these rolls, however, were duplicates; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the supernumeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and can not be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency, consequently follow the realty on the principle by which duplicate keys of a banking-house, or the toll-dishes of a mill, follow it.

We are of opinion, therefore, that the rolls in question passed as a part of the freehold by the mortgage and sale on the *levari facias*; but that if they had not passed, they could not have been sold as chattels on the plaintiff's *fieri facias* against the mortgagor: and were it necessary, we would further hold that they might have passed, had they been chattels, by force of the word apparatus in the description of the premises. On all these points the case is with the defendant.

Judgment affirmed.

STEAM-ENGINE ERECTED BY A TENANT FOR LIFE for the purpose of trade is not a fixture: *Estate of Hinds*, 34 Am. Dec. 542; but it is otherwise with the running gear of a cotton gin attached to the freehold: *McKenna v. Hammon*, 30 Id. 386. The cases hitherto reported in this series upon this subject are embraced in the note to the case last cited. See also *Pyle v. Pennock*, *post*, 517.

THE PRINCIPAL CASE HAS BEEN CITED AND APPROVED UPON THE FOLLOWING POINTS: that the criterion by which to determine whether a particular article is a fixture, is the use or purpose to which it is devoted, and not by any reference to the fact of physical annexation to the freehold: *Carey v. Bright*, 58 Pa. St. 85; *Hill v. Sewald*, 53 Id. 274; *Overton v. Williston*, 31 Id. 158; but after severance from the realty by separation indicating an intent to consider machinery as personalty, its character is changed: *Ross' Appeal*, 9 Id. 493; *White's Appeal*, 10 Id. 252; *Shell v. Haywood*, 16 Id. 530. A planing-machine, lathes, and vices in a machine shop pass by a sale of the realty irrespective of the manner in which they are attached to the building: *Christian v. Drippa*, 28 Id. 271; so with the personal property of a railroad company which is necessary to carry on its operations: *Covey v. P. F. W. & C. R. R. Co.*, 3 Phila. 173; and a severance of machinery is a fraud upon prior judgment creditors: *Witmer's Appeal*, 45 Pa. St. 455.

LOWRY v. HALL.

[2 WATTS AND SERGEANT, 129.]

INVOLUNTARY TRANSFER OF PROPERTY BY VIRTUE OF PROCESS OF A FOREIGN COURT having jurisdiction of the parties and the subject-matter of the action, will not be disturbed by the courts of another state within whose jurisdiction the property may be removed *pendente lite*.

DEFENDANT IN AN ACTION OF REPLEVIN IN THIS STATE may avail himself of a delivery to him of the same property pursuant to a writ of replevin issued out of a court of competent jurisdiction of another state, previously, while the parties to the action and the property in dispute were within the jurisdiction and subject to the law of the place of delivery.

PENDENCY OF A PRIOR SUIT IN A FOREIGN COUNTRY can not be pleaded in abatement of an action for the same cause in this state as to actions which are strictly personal in their nature, but the pendency of a proceeding *in rem* in a foreign jurisdiction may be so pleaded, as also may a proceeding in a mixed action, in which a specific thing as well as the performance of a personal obligation is demanded.

RECORD OF AN EARLIER AND PENDING ACTION OF REPLEVIN BROUGHT IN A FOREIGN STATE while the goods were within its jurisdiction, and in which possession was delivered to the plaintiff, may be given in evidence to support a plea in bar of a similar action brought by the former owner of the property to regain possession of it after its removal to this state.

DELIVERY OF PROPERTY UNDER A WRIT OF REPLEVIN to the plaintiff in an action entitles him, as against the defendant, to the right of possession pending the determination of the suit.

UNDER GENERAL PLEA OF PROPERTY WITHOUT FURTHER SPECIAL PLEA, evidence of a delivery to a defendant in an action of replevin, of the same property in a prior undetermined action in another state, may be received.

REPLEVIN. Defendants pleaded property in themselves. In support of this plea they gave in evidence the record of an earlier action of replevin brought in the state of New York, in which the possession of the property, consisting of a lot of lumber, was given to the present defendants, who were plaintiffs in the former action, the lumber, at the time of its delivery to defendants, being in the form of rafts *in transitu* from New York to Pennsylvania. As soon as the lumber reached the state of Pennsylvania the present action of replevin was instituted to regain possession, by Lowry, who was defendant in the prior suit. Verdict and judgment for plaintiff.

Galbreath and Marvin, for the plaintiff in error.

Hazeltine and McCandless, contra.

By Court, GIBSON, C. J. The case of *Johnson v. Hunt*, 23 Wend. 87, so much relied on, does not touch the point before us. It rules no more than that an insolvent debtor's voluntary assignment of personal property abroad, is not to be affected by process of attachment in the nature of a commission of bankruptcy which operates, as it must, only upon his property at home. The assignment in that case was not procured by coercion of the law of Pennsylvania, where the property happened to be at the time. The absconding debtor gave it to discharge a debt for which he was arrested in execution; and the payment was, in contemplation of law, a voluntary one. The property, being beyond the confines of the state, was neither attached, nor subject to attachment by the law of New York, and might well be dealt with as if the owner were domiciled at the place of the actual *situs*. The court, therefore, very properly disregarded the supposed lien of the attachment in New York, and held the transfer good by the law of Pennsylvania. The principle of that case is precisely the principle of *Mulliken v. Aughinbaugh*, 1 Penn. 117, in which an inhabitant of Maryland was not allowed to attach a debt in Pennsylvania which the creditor in Maryland had assigned to obtain a discharge from arrest under the insolvent law of that state; and the same rule would have been applied to an attachment by an inhabitant of Pennsylvania, because, unlike a commission of bankruptcy which is *in invitum*, the proceeding to insolvency was sought by the debtor as a remedy, of which a general assignment of his effects was the price; and because the voluntary transfer of a chattel by the debtor, if it be not forbidden in other respects by the law at the place of the *situs*, is to be as much regarded there, or elsewhere, as it would be at the place of the domicile. The scope of the American cases is, that an involuntary transfer, by process abroad, within the jurisdiction of the state at the time, will be disregarded only so far as to protect the claims of our own citizens; but in *Abraham v. Plestoro*, 3 Wend. 538 [20 Am. Dec. 738], the rule of comity was so far narrowed that an assignment under a British commission of bankruptcy was held void against a British creditor not domiciled here, and consequently not having acquired an American character for commercial purposes. This constitutes the difference between the American measure of comity and the British, which allows a foreign transfer to operate on effects in England, whether it were voluntary or by operation of law.

But movable property, whose actual *situs* is in the country of

the owner's domicile, is so far subject to the laws in force there, that no foreign tribunal will question the validity of an involuntary transfer of it by operation of them; nor was this principle doubted even in *Abraham v. Plestoro*, for the senators who overruled the chancellor and the law judges, seem to have thought that the property was beyond the reach of the British bankrupt laws at the point of time deemed material by them. Indeed, without that, the case would not have a foot to stand on; and even conceding the fact, it is difficult to understand how the principle of comity could be dispensed with in favor of those who had no peculiar claim to the court's protection. As a precedent emanating from the highest judicial authority in New York, that decision must of course rule the law in that state; but the dissenting opinion of Mr. Justice Marcy will probably command more respect elsewhere. To sustain a title under a foreign judgment it is sufficient that the court had jurisdiction of the cause and the parties, whether the proceedings were *in personam* or *in rem*; and it can not be said, in respect of the latter, that there is want of jurisdiction when the thing is subject to the law at the *locus contestationis litis*, and when all men are parties. In the case before us, not only the thing but the litigants were subject to the law of New York. It is emphatically remarked by Mr. Justice Story in his *Conflict of Laws*, that the law protects nothing which it has not a right to regulate; and hence it is, that he who sends his property abroad, submits it beforehand to all the regulations in force where it is sent. The law of the actual *situs*, therefore, not only protects the ownership of movable property, but prescribes the mode of its transfer; and I take it that neither a British nor an American creditor could successfully contest the validity of an assignment under a British commission of bankruptcy, if the property had been in England at the time of the assignment; or perhaps at the time of the act of bankruptcy. That such assignees are allowed to maintain actions in our courts, for any purpose, shows that those laws are permitted to have an operation on the title to property in this country, at least to some extent; and the proper limitation of it seems to be that the principle of comity be not carried so far as to let the effects be withdrawn from our jurisdiction before our own citizens, or domiciled foreign merchants, are satisfied. In all beside, I see no impropriety in suffering foreign laws to operate here on the rights and property of those who would be bound by them at home.

Can not, then, a defendant in replevin here, avail himself of

a delivery to him, pursuant to a writ of replevin issued out of a court of competent jurisdiction in another state, when not only the litigants but the thing delivered were subject to the law at the place of delivery? The pendency of a prior suit in a foreign country, can not be pleaded in abatement of a suit for the same cause here; and it has been held that the states of the American union stand in the relation of foreign states as regards this particular matter. Conceding that for the moment, it follows not that the pendency of a proceeding *in rem* may not be so pleaded; and the same may be said of what, in the language of the civil law, are called mixed actions, or those in which a specific thing, as well as performance of a personal obligation, is demanded. Such in all respects are actions of replevin, in which not only the thing taken, but damages for the taking of it, may be recovered. But though there was no attempt in this case to plead the New York replevin in abatement, it was given in evidence; and does it not support the plea in bar? It is requisite that a plaintiff in replevin have not only property, general or special, in the thing taken, but also an immediate right to possess it: 2 Saund. Pl. & Ev. 760. For that reason it was said, in *Templeman v. Case*, 10 Mod. 25, that a plaintiff can not maintain replevin for the goods of a stranger taken from the plaintiff's custody; though it was conceded that he might maintain trover, or trespass *de bonis asportatis*; and for the same reason it was said by Chief Justice Parsons, in *Isley v. Stubbs*, 5 Mass. 283, that goods attached by an original writ as security for the judgment, can not be replevied. After the execution of the first replevin then, who had a right to the possession of this lumber by the law of New York? Unquestionably not he from whose possession it had been taken by the authority of that law, and committed to the custody of an antagonist claimant, to abide the event of the suit. It is easy to see from *Morris v. Dewit*, 5 Wend. 71, what would have been the fate of a counter replevin there; and if the court had such jurisdiction of the thing as warranted a particular disposition of it, its authority must be respected here: so that the pinch of the case is to determine whether evidence of the prior delivery supports the plea of property, or whether the fact ought to have been pleaded specifically.

In that state the action of replevin is moulded by a statute, but mainly according to the model of the action as it exists at the common law. Though the inquisition of a sheriff's jury on a claim of property is not evidence of the fact on the trial of the

issue in court, it seems that a plaintiff who has received the property from the sheriff, has power to make it his own at all events, inasmuch as the *capias in withernam* is abolished. The writ *de retorno habendo* is retained; yet when the plaintiff has carried the property out of the county, the writ of return can not reach it, and the defendant is necessarily thrown upon his verdict for the value, or on an action on the replevin bond. It is unnecessary to contend that his title becomes absolute in form by the eloignment, for it is enough that the ownership is taken to be in him till his title is disproved by the trial of the issue. But the property has been delivered to him as his own on the basis, real or supposed, of having been wrongfully taken from him; and as possession is *prima facie* evidence of title, delivery to him after a claim of property which admits the taking, necessarily is so too; at least it settles the right to treat it as his own till it be adjudged to belong to another. The plea of *non cepit* admits the property to be in the plaintiff; and the defendant's claim of property, where he makes it, is as fully rebutted by the inquisition of the sheriff's jury till it be otherwise settled by a trial of the issue, as if it had been waived in the first instance. Such, I take it, would be the state of the case in New York; for the plaintiff in the original action there, would surely have been at liberty to maintain an action against a stranger for an injury to the property during the pendency of the replevin, and *a fortiori*, he might have maintained such an action against the defendant, bound, as he was, to respect the sheriff's delivery with or without an inquisition.

If such, then, would be his relation to the property in that state, it must necessarily be the same in this. An article thus delivered might be a perishable one, and, to preserve it from loss, might require it to be consumed or sent to market; and it would be intolerably inconvenient if the defendant in the replevin could follow it into the hands of a purchaser abroad; yet the purchaser of a chattel takes no more than the title of the vendor, except by a sale in market overt, of which we know nothing in practice. Starting as this lumber did from New York, it might, on the principle of the plaintiff's pretension, change masters as often as it arrived within the confines of an intervening state, and leave a lawsuit at each change, not only in New York, but in Pennsylvania, Ohio, Virginia, Kentucky, Indiana, Illinois, Tennessee, Mississippi, and Louisiana. The bare statement of such a thing is proof that it can not be. Whatever be the rule between states that are strangers to each

other in commercial and political ties, every member of the American union is bound for its own sake to observe any degree of comity necessary to avoid consequences so disastrous. That every state is bound to protect the interests of its own citizens in the first place, is undeniable; but it best protects them on the basis of an enlarged reciprocity.

Judgment reversed.

REGULARITY OF ATTACHMENT PROCEEDINGS IN ANOTHER STATE is to be determined by the law of that state: *French v. Hall*, 32 Am. Dec. 341. The notes and cases contained in this series upon the subject, when the law of the place of situation of property controls where a transfer is made in another state, will be found in the note to *Chapman v. Robertson*, 31 Id. 270. A plea of the pendency of an action in another state is not a defense to a suit between the same parties for the same cause of action, at the same time, brought in Pennsylvania: *Smith v. Lathrop*, 14 Pa. St. 326, citing the principal case. Cited also to show that while the law of the place of the actual *situs* of personal property will protect the claims of creditors domiciled there against involuntary transfers by operation of law in another state, yet the protection extends to involuntary transfers only, in *Speed v. May*, 17 Id. 95. It will be observed from the first citation above given from the same state, that the authority of the principal case is somewhat shaken upon the point that the plea of *lis pendens* in another state is any defense to an action for the same cause in Pennsylvania.

GRAY v. MONONGAHELA NAVIGATION COMPANY.

[2 WATTS AND SERGEANT, 156.]

STATUTES WHETHER PUBLIC OR PRIVATE MAY BE PROVED by a copy of the laws in which they are included, as published by authority of the legislature of the state where they are in force.

GRANT OF ADDITIONAL PRIVILEGES TO A CORPORATION IS NOT AN INVASION OF THE CONTRACT between it and subscribers to its capital stock, although the amount for which the stockholder was formerly liable may be thereby increased.

CONSTITUTIONAL LIMITATION ON POWER TO PASS LAWS IMPAIRING OBLIGATION OF CONTRACTS has reference to direct and not to merely consequential invasions of it.

OBLIGATION OF CONTRACT IS NOT IMPAIRED BY A LAW which merely varies its consequences without changing the essence and character of the contract, or altering the nature of the obligation created by it.

ACT IS NOT UNCONSTITUTIONAL which removes a limitation imposed by a prior act of incorporation upon the power of a corporation to incur a debt.

MISTAKE OF CORPORATE NAME IN NOTICE TO STOCKHOLDER calling for payment of his installment of an assessment does not vitiate it.

MISNOMER OF CORPORATION IN THE PLEADINGS in an action brought by it against a stockholder to recover the amount of his assessment, can not be taken advantage of unless specially pleaded in abatement.

CASE. This action was brought in the name of the "president, managers, and company of the Monongahela navigation company," this being the title under which it was originally incorporated. Prior to the commencement of this action its name had, by supplemental act, been changed to the "Monongahela navigation company." The object of the action was to recover of defendant installments due on shares of stock subscribed by him to the corporation at the time of its organization. Plaintiff at the trial offered in evidence a copy of the laws of the general assembly at the session at which the act of incorporation was passed. Defendant objected on the ground that the act was a private act, to prove which the volume containing the general laws of the state was not competent. The objection was overruled. The defendant offered evidence to show that after his subscription had been received, the corporation had been authorized, by a supplemental act of the legislature, to extend its dams, thereby increasing the amount of its indebtedness beyond what its charter permitted when the defendant became a stockholder. It was contended that the obligation of the company's contract with defendant was thereby impaired, and that the act and the increased indebtedness were invalid and unauthorized. Defendant pleaded want of notice of his assessment being due, as required by the laws of the corporation, and, under this plea, introduced evidence showing the notice to have been given in the name of the corporation as it existed before the passage of the supplemental act, changing its corporate name, before referred to. Verdict and judgment for plaintiff.

Findlay, for the plaintiff in error.

Williams, contra.

By Court, GIBSON, C. J. It has long been settled by decision and practice, that the copy of the laws published annually by the authority of the legislature, is evidence of the statutes contained in it, whether they be public or private; and this disposes of the first bill of exceptions to evidence.

The second brings up the only material point in the cause; but the exception can not be sustained. A grant of additional privileges to a corporation, has certainly not been thought an invasion of the contract which exists between it and subscribers to its stock. It is alleged to be so, in this instance, because the grant of a privilege to raise the dams higher than was allowed by the original act might lead to a greater expenditure

to compensate injuries to the riparian owners by flooding their lands, than was contemplated when the defendant became a stockholder. But what was there in the contract of subscription to forbid the acceptance of such a grant? The contract remains unchanged by it, though its consequences may be varied: it was to pay so much the share, and so it is yet. But the constitutional restriction of the power of the states to enact laws which impair the obligation of a contract, has regard to direct and not consequential invasions of it. Thus in *Mason v. Haile*, 12 Wheat. 370, it was considered that a state has a right to regulate or abolish imprisonment for debt as a part of the remedy for enforcing a debt, though by doing so it undoubtedly takes away one of the incidental advantages of the contract which may have been in view of the creditor when he entered into it. So also in *Watson v. Mercer*, 8 Pet. 88, an act to confirm a title imperfect under the recording laws, was held good. That act, however, tended more properly to establish the obligation of a contract than to impair it; yet it certainly varied the consequences of the contract, such as it was. In *The Providence Bank v. Billings*, 4 Pet. 514, the purpose of a corporation, however, was said to be no more than to give individuality, and a right of succession to a body of men, and not to exempt them from the burdens that were common to them at first; and hence it was held that a state may constitutionally tax the property of a bank previously incorporated by it, though such taxation undoubtedly affects the consequences of the subscriptions by decreasing the rate of the dividends. In like manner, it was held, in *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 11 Pet. 420, that an act to incorporate a company to erect a bridge so near the bridge of another incorporated company as injuriously to affect it, is within the legitimate power of a state, though such an exercise of it necessarily takes away a part of the fruits of the contract by reducing the amount of the tolls.

Thus we see that the principle is emphatically applicable to a contract with a corporation, which, though technically a private one, has been created for a public object. Mr. Justice Story remarked, in delivering the opinion of the court in *Terrett v. Taylor*, 9 Cra. 52, that in respect to public corporations which exist only for public purposes, such as counties, towns, cities, and the rest, the legislature may, under proper limitations, have a right to change, modify, enlarge, and restrain them, securing, however, the property for the use of those for whom, and at

whose expense, it was originally purchased. Is not a corporation to improve the navigation of a river which is a part of the public domain, though it be authorized to demand tolls in compensation of its outlay, a public one? If it be not, a bank of the United States for the fiscal purposes of the federal government, which has been authorized to discount notes and deal in exchange on its private account, would not be a public corporation, and it would consequently be beyond the constitutional power of congress to grant such a bank a charter. In *Irvin v. The Turnpike Company*, 2 Penn. 466 [23 Am. Dec. 53], it was ruled that the benefit which would incidentally result to the property of stockholders near the proposed route of a turnpike road does not enter into their contract of subscription as a part of its consideration; and that they engage in the enterprise necessarily subject to the power of the legislature to change the route for the public good, when the contrary has not been stipulated in the act of incorporation. Now an act to incorporate a company for purposes of slack-water navigation, is as essentially of a public nature, as is an act to incorporate a company for the purpose of making a turnpike road. In this instance, then, what has the legislature of Pennsylvania done? It has not pretended to take away any corporate franchise, or to impinge upon any right before granted. That is not pretended. On the contrary, it has enlarged a corporate privilege. But the exercise of it, it is alleged, may plunge the company into an expense not originally contemplated. What of that? The defendant is not bound to contribute to it beyond the amount of his original subscription, and as to that, his contract remains the same. But it is said that by taking off the limitation of the company's expenditure, the legislature has altered its power to incur responsibility for greater damages than it otherwise could have done. In that lies the fallacy. The legislature has not made it incumbent on the company to use the additional privilege granted to it; but has left the use of it to its discretion. It may, in fact, never use it, and whether it shall do so, will depend on the volition of the defendant's corporate agents, the president and managers, by whose acts he is necessarily to be bound as his own, even in the acceptance of a modification of the charter for the public good, provided it do not extend to a change of the structure of the association, as was attempted in the *Indiana and Ebensburg Turnpike v. Phillips*, 2 Penn. 184, where the original corporation was broken up, and the subscribers to its stock were apportioned according to an arbitrary line of demarcation

as regarded their residence, and transferred to the one or the other of two distinct corporations erected on its ruins. To do that was declared to be beyond the legislative power. On any other principle than that of *Irvin v. The Turnpike*, already quoted, no improvement in the plan of a public work once begun, could be made without cutting loose the corporators from their subscriptions, and resolving the corporation into its primitive elements. Such improvements or alterations are frequently made, and subscriptions to the stock are consequently in subordination to the practice. At all events, it is sufficient for the argument that the constitutional restriction has been restrained by the ultimate tribunal to interference directly with the terms of the contract, and not merely with its incidents.

The mistake of the corporate name in giving notice of the call on the stockholders for their installments, was immaterial. Notice of such a call is necessary only to subject them to the penalty of two per cent. a month for default of payment; not to found an action for the principal, which may be demanded on the foot of the call without notice of it. Here, the action is for the two installments due, while a demand of the penalty is waived.

The plaintiff has sued by the original corporate name, which it bore at the date of the contract, and not by the name, modified by a supplemental act, which it bore at the inception of the suit; but in the state of the case presented by the record, the variance is immaterial; for, to take advantage of it, it must be pleaded in abatement, as every other misnomer must. It was, indeed, said by Chief Justice Treby, in *Britton v. Gradon*, 1 Ld. Raym. 119, that a judgment against a corporation by a wrong name is void; on which it is remarked in *Kyd on Corporations*, 285, that "it is indeed true that in most of the cases where the question of misnomer of a corporation has been agitated, it has arisen on a special verdict; but I apprehend that where a corporation have taken no advantage of a variance from their name, either by plea or at the trial, they can not arrest the judgment on that account." Surely the rule must be the same where the corporation is plaintiff. It seems, however, that if the variance be apparent in the entry of the judgment, it may be error; as in *Healings v. The Mayor, Commonalty; and Citizens of London*, Cro. Car. 574, where the judgment was that the mayor, commonalty, and citizens should recover their debt and costs to the same mayor and commonalty adjudged (omitting the word citizens), it was held to be error. But as there is no such discrepancy in the record before us, which contains but one des-

ignation of the plaintiff throughout, there is no room in the case even for this sharp distinction; and the exception that the court ought not to have rendered judgment on the verdict, is not sustained.

Judgment affirmed.

LAWS IMPAIRING OBLIGATION OF CONTRACT. See the note to *Goshen v. Stonington*, 10 Am. Dec. 131; as to statute divesting powers of a corporation, see *Montpelier Academy v. George*, 33 Id. 585, and cases cited in the note.

CORPORATION IS NOT REQUIRED TO PROVE ITS INCORPORATION under a plea of the general issue: *Prince v. Commercial Bank of Columbus*, 34 Am. Dec. 773; a defendant in an action by a corporation must plead its non-existence in abatement to entitle him to call for proof thereof: *Penobscot B. Corporation v. Lamson*, 33 Id. 656, and cases cited in the note.

THE PRINCIPAL CASE HAS BEEN CITED to show that notice of a call on stock holders to pay the amount of their subscriptions is not necessary prior to commencing an action for the amount due, although such notice would be required in order to subject the stockholder to the penalty for non-payment, in *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 305; also in *Rheem v. Naugatuck Wheel Co.*, 33 Id. 363, and *Fritz v. Commissioners*, 17 Id. 135, upon the point that a misnomer of a corporation plaintiff can be taken advantage of only by a plea in abatement. Upon the proposition that the obligation of the contract of a corporation with a subscriber to its stock is not impaired by a law extending the powers and privileges of the corporation in accordance with the original design and objects of its organization, the principal case is cited in *Everhart v. Philadelphia & West Chester R. R. Co.*, 28 Id. 353; so a change in the line of location of a railroad will not enable a stockholder to set up as a defense to an action for his subscription, that he subscribed upon condition that the road should be located as originally projected: *P. & S. R. R. Co. v. Biggar*, 34 Id. 455; *P. & S. R. R. Co. v. Woodrow*, 3 Phila. 271.

McCOMBS v. McKENNAN.

[2 WATTS AND SERGEANT, 216.]

PLACE OF DELIVERY OF ARTICLES STIPULATED IN SEALED CONTRACT is a condition precedent merely, imposed upon the party bound, which may be waived by the party entitled to its performance without producing any alteration of the original contract.

AGREEMENT TO ACCEPT DELIVERY AT A PLACE OTHER THAN THAT SPECIFIED in the original contract does not constitute a new contract.

COVENANT MAY BE SUSTAINED UPON A CONTRACT UNDER SEAL notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was altered, and performance may be shown by evidence of a delivery at the place agreed upon.

UPON A CONTRACT TO DELIVER ARTICLES AT A PARTICULAR TIME and place for a specified price, the party bound thereby, after making delivery in the manner agreed upon, if the price be not paid, may remove the articles and resell them, and may recover upon the original contract as for a breach thereof.

A RECOVERY IS NOT DEFEATED BY THE ACCEPTANCE BY THE CONTRACTOR of a portion of the consideration, prior to the removal and sale by him of the articles delivered.

MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE CONTRACT PRICE and the sum for which the articles were subsequently sold.

COVENANT. This action was upon a sealed agreement by which the plaintiff bound himself to deliver to the defendant two hundred bushels of clover-seed, at the town of Indiana or at the city of Pittsburgh, or one hundred bushels at each locality, on or before the first of February, 1839. The defendant agreed to pay fifteen dollars per bushel at the time of delivery. After fifty-five bushels had been delivered at Pittsburgh, the defendant agreed to receive the residue at Indiana, which the plaintiff accordingly delivered at that place within the time specified. The defendant made payments as follows: Upon the twenty-ninth of January, 1839, seventy-five dollars, and upon the fourteenth of February following, seventy-two dollars and fifty cents. No other payments being made, after demand, the plaintiff removed the seed and sold it for the sum of eleven dollars and fifty cents per bushel. Verdict and judgment for plaintiff.

Mahon, for the plaintiff in error.

Van Amringe, for the defendant in error.

By Court, **SERGEANT, J.** The first error assigned is in the answer of the court, that under the evidence the action might be maintained on the sealed contract. The defendant contends that the contract had been subsequently varied by the agreement of the parties, that the residue of the seed should be delivered at Indiana instead of Pittsburgh; and therefore the plaintiff's action should have been assumpsit on the new contract, and not covenant on the original one. We think, however, the true principle is stated in the charge of the court, that this was not so much an alteration of the original contract, as a waiver or dispensation on the part of the defendant, of certain things to be done by the plaintiff, which were conditions precedent to be performed by him. If a party agrees to accept the thing to be delivered at another time or place than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. It imposes no new duty on the defendant; he merely accepts as performance by the plaintiff that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same.

The second error assigned is in the charge of the court below, that the removal of the clover-seed did not amount to an abandonment of the contract, and is not fully answering said point. The removal of the clover-seed, after the defendant had failed to comply with his bargain, was no abandonment of the contract by the plaintiff. He was not bound to keep it where it was, and let it perish, or wait the rise and fall of the markets. If he took it away for the benefit of all concerned, for the purpose of fairly selling it for the best price that could be got for it, it was no more than he had a right to do, and was perhaps incumbent on him to do, as the defendant had shown his inability or indisposition to receive it on the terms stipulated.

The third error assigned is, in the statement of the court, that the receipt of money on the contract before and after the first of February, did not preclude the recovery of damages. If the defendant has violated his contract to the injury of the plaintiff, his partial payments of small sums of money, before or after the time when the contract was broken, can not take away this right of the plaintiff to indemnity, unless there was some stipulation or agreement by the plaintiff at the time of payment that it should have that effect, or the plaintiff accepted the money on that condition, and gave up his claim to damages. Of this there was no proof, and therefore all the defendant could claim was a credit for these sums in the settlement of the damages, which he appears to have received.

The fifth error is in stating that the measure of damages would be the difference between the contract price of seed and the price it subsequently sold for. To this, however, the court added, provided that sale was made *bona fide* and to the best advantage of all concerned, and that the jury are not bound by this rule, if they can find another more in accordance with the justice of the case. And this appears to be the same kind of direction which was given in the case of *Andrews v. Hoover*, 8 Watts, 239, and approved by this court; and also in *Girard v. Taggart*, 5 Serg. & R. 32 [9 Am. Dec. 327]. A resale is a usual mode to ascertain the difference between the contract price and the value of the article when the vendee refuses to accept it. But it is not the only mode, nor even when it takes place, is it decisive. The jury may, as was the case here, have evidence of other kinds to show the value, and are to judge in the best manner they can from the whole case. The law lays down no one mode as the exclusive one for settling the value of an article in market, at or about a given time; it is a matter to be left to the

jury on the evidence, and that seems to be the principle of the cases.

Judgment affirmed.

RESALE BY VENDOR AFTER REFUSAL BY VENDEE TO PERFORM HIS CONTRACT: See *West v. Cunningham*, 33 Am. Dec. 300, and note.

STIPULATION BY PAROL WAIVING PERFORMANCE OF PART of a covenant is not an alteration of a sealed agreement: *Sawall v. Rader*, 24 Pa. St. 285; *McGrann v. North Lebanon R. R. Co.*, 29 Id. 91; but if the modification by parol is in relation to some particular matter essential to the defendant's liability upon the original agreement, the latter will be treated as abandoned, and the form of the action in that case is assumpsit: *Lehigh Coal and Nav. Co. v. Harlan*, 27 Id. 442. The alteration must be such as to constitute a new contract: *McManus v. Cassidy*, 66 Id. 260; in all of which the principal case is cited.

CHAMBERS v. BEDELL.

[2 WATTS AND SERGEANT, 225.]

OWNER OF A CHATTEL WRONGFULLY TAKEN FROM HIS POSSESSION and placed upon the land of another, may lawfully enter and retake it, and is not liable even for nominal damages for so doing.

MISDIRECTION OF THE JURY UPON AN ABSTRACT MATTER which is rendered wholly immaterial by a correct instruction upon another matter decisive of the cause, constitutes no ground upon which to reverse a judgment in favor of the party in whose behalf the instructions were given.

TRESPASS *quare clausum fregit*. The parties were owners of adjoining tracts of land, and disputed about their partition line. The plaintiff cut a quantity of timber from the land in dispute and conveyed it to a portion of his own land. The defendant entered and hauled it away. It was shown clearly that the land where the rails were cut belonged to the plaintiff. The lower court instructed the jury that whether the land belonged to the plaintiff or not he was at least entitled to recover nominal damages, but that as the evidence conclusively established the plaintiff's title, he was entitled to recover the value of the property taken and damages.

McCandless, for the plaintiff in error.

Van Amringe, contra.

By COURT. It is certain, that if the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or with the connivance of the owner of the land, the owner of the chattel can not enter to retake it; but that

if it be put there without the fault or consent of either party, the owner of the chattel may enter and take it peaceably, after demand and refusal of permission, repairing, however, any damage which may be occasioned by his entry. So, also, where the parties are in equal default, for instance, by omitting to repair a partition fence, by reason of which the cattle of the one happens to stray into the close of the other. But all the books agree, that where a chattel escapes from the possession of its owner by his consent, exclusive negligence, or other default, he can not pursue it into the close of another, without becoming a trespasser by his entry; but that he may lawfully enter and retake his property, where it has been wrongfully taken or received by the owner of the land. Now, if the property in the rails in question had been in the defendant, the plaintiff who had piled them on his land, could not have recovered even nominal damages for the defendant's entry to remove them; and in this respect the direction would have been wrong. But it was in clear and uncontradicted proof, that the defendant, Chambers, had not even a colorable title to the land where the rails were grown, and made, and consequently not even a colorable title to enter on the plaintiff's land in order to carry them away; and the inaccuracy of the charge in this abstract particular, was therefore immaterial.

Judgment affirmed.

OWNER OF LAND IS NOT LIABLE IN TRESPASS for cutting and carrying away the grass of another who is wrongfully in possession of it: *Barnes v. Dean*, 30 Am. Dec. 346 and note.

BOLTON v. HAMILTON.

[2 WATTS AND SERGEANT, 294.]

EXCLUSIVE POSSESSION BY ONE TENANT IN COMMON AND RECEIPT OF THE RENTS AND PROFITS of the common land for a great length of time, is not sufficient to create a legal presumption of the actual ouster of a co-tenant.

WHETHER AN OUSTER RESULTS FROM SUCH POSSESSION and occupancy is a question of fact to be determined by the jury.

EJECTMENT. The jury was instructed at the trial to the effect that the exclusive and peaceable enjoyment of common land for fifty years, as shown in this case, by a co-tenant, is sufficient to create a presumption of the ouster of another co-tenant, and to give the former a perfect and indisputable title.

Alden and Dunlop, for the plaintiff in error.

McKennan, for the defendant in error.

By Court, GIBSON, C. J. It is, perhaps, not to be maintained that a jury is bound to raise a legal presumption of ouster from an exclusive actual possession by a tenant in common for twenty-one years, though it is indicated as the opinion of the court in *Mehaffy v. Dobbs*, 9 Watts, 363. The matter was perhaps not very clearly stated by the judge in that case; but the design was, to put the decision of the point on the basis of *Frederick v. Gray*, 10 Serg. & R. 182, in which it was held that the possession of a tenant in common is to be deemed adverse from the time he exclusively claimed the whole; and so the law was laid down in *Phillips v. Gregg*, 10 Watts, 158, with this qualification, that his claim appears to have been indicated by some unequivocal act, which is perhaps the true criterion. In *Frederick v. Gray*, it was held sufficient that a claim of exclusive ownership was manifested by the occupant's acts; yet such acts ought so necessarily and notoriously to import a claim of exclusive right, as to apprise the co-tenant of the nature and existence of it. Thus in *Law v. Patterson*, 1 Watts & S. 186, the land was purchased and paid for by the co-tenant in possession; and he had not only taken all the profits of it to himself, but had let it, and exercised all the usual acts of exclusive dominion over it, under the immediate eye of his co-tenant, who lived in the neighborhood, and whose claim to ownership in common rested only upon the fact that his name was found as a grantee in the deed. And perhaps the decision of the court in *Hart v. Gregg*, 10 Watts, 190, went no further, though it contains a *dictum* that a claim of exclusive right, attended by a receipt of all the profits, is insufficient to let in a presumption of ouster—a position not easily maintainable against the preceding decisions, or that in *Doe v. Prosser*, Cowp. 217. It seems to be admitted by the opinion of the court, in *Hart v. Gregg*, that claiming the whole, and denying possession to the co-tenant, as the law was held in *Doe v. Bird*, 11 East, 49, would have that effect; but it is hard to perceive a substantive difference between such a denial and a claim of exclusive right. The one is perhaps implied by the other, and the difficulty has regard to the notoriety of the act by which the assertion of right is to be proclaimed. Still, the judge below went too far in directing that a receipt of profits merely, may be sufficient to found a legal presumption of actual ouster. Such a receipt, for a great length of time, may indeed

raise, not a legal but a natural presumption of it, passing with the jury for what it is worth, and operating no further than it happens to produce, actual conviction of the fact, as it was allowed to do in *Nickle v. McFarlane*, 3 Watts, 167, where it was ruled that the jury were not bound to presume an ouster from an exclusive possession of sixty years, even though the parties had not stood in the relation of tenants in common. When the cause goes to another trial, therefore, it will be for the jury to say whether they ought to believe, from lapse of time merely, that the plaintiffs or their ancestor had parted with, or lost their title.

The judgment is therefore reversed and a *venire de novo* awarded.

HUSTON, J., dissenting.

POSSESSION BY ONE TENANT IN COMMON IS NOT ADVERSE to his co-tenant unless accompanied by some specific acts indicative of an intent to hold adversely: *Phillips v. Gregg*, 36 Am. Dec. 158; nor does the possession of a tenant in common and perception of the rents and profits amount to an ouster of a co-tenant: *Hart v. Gregg*, Id. 166. In the notes to these cases many others are cited upon this subject. See also *Watson v. Gregg*, Id. 176.

THE PRINCIPAL CASE IS CITED upon the point that to constitute an ouster of a co-tenant, the perception of the profits must be accompanied by a claim of exclusive right, or other proof of adverse possession, in *Calhoun v. Cook*, 9 Pa. St. 227; *Wilson v. Collishaw*, 13 Id. 277; *Susquehanna Coal Co. v. Quick*, 61 Id. 340.

COFFMAN v. HAMPTON.

[2 WATTS AND SERGEANT, 377.]

DOCKET OF A JUSTICE OF THE PEACE IS THE BEST EVIDENCE of the proceedings had in an action before him, and of the nature and cause thereof, and parol evidence is not admissible to vary or contradict it.

COURT MAY CHARGE THAT THE INFERENCE TO BE DERIVED from an arrangement between a constable and a purchaser at a sale under execution, by which the latter agreed to settle the following day for the price bid for the articles, is, that the intention of such arrangement contemplated a delivery of the goods by the constable at such time, and a payment therefor of the sum bid, by the purchaser.

CONSTABLE'S COSTS AND CHARGES FOR KEEPING THE PROPERTY up to the time stipulated for payment, become part of the terms of the sale, for which the purchaser is liable.

FAILURE OF PURCHASER TO MAKE OR OFFER PAYMENT within the time agreed, is a default upon his contract, for which he is liable.

VENDOR MAY RESELL AFTER DEFAULT of purchaser in paying the sum bid by him for goods within the time agreed.

PURCHASER IS LIABLE FOR THE CONSTABLE'S COSTS AND CHARGES in ad-

dition to the purchase price offered at the prior sale, if the proceeds of the resale are not sufficient to cover the entire amount.

TENDER OF PURCHASE PRICE AFTER DEFAULT by failure to make payment at the time agreed upon, is insufficient unless the costs and expenses of the vendor in taking care of the property up to that time be also tendered.

PURCHASER AT CONSTABLE'S SALE CAN NOT SET OFF in an action against him to recover a deficiency after a resale, a claim against the constable for rent due him as landlord from the defendant in the former suit, whose goods in the hands of the constable or the proceeds of the sale thereof it is insisted are liable for its payment.

DEBTS OR DEMANDS TO CONSTITUTE A SET OFF must be due in the same right.

WHERE UPON A SALE AT AUCTION OF NUMEROUS ARTICLES of personal property the purchaser is given the option of choosing from a quantity, a specific amount, the privilege being sold as successive "choices," it becomes incumbent upon the purchaser to make his choice forthwith. He can not take advantage of his own neglect to do so to avoid his liability upon the purchase.

THOUGH IN AN ACTION AGAINST A VENDEE to recover the sum due upon a sale, the usual mode of ascertaining the measure of damages where there has been a resale, is the difference between the price first offered and that for which the goods were eventually sold, yet the jury are not bound by this mode of estimation if they can discover any other more agreeable to the truth.

SALE AT AUCTION OF NUMEROUS ARTICLES OF PERSONAL PROPERTY constitutes but one entire contract though the articles are separately struck off at different prices.

ASSUMPSIT. The plaintiff, Hampton, as constable, brought this action to recover of defendant the sum of two dollars and twenty-five cents, deficiency after a resale of goods brought by the defendant at a prior sale under execution, for which he afterward neglected to pay. Plea, *non assumpsit*. The defendant also pleaded as a set-off, a certain debt for rent due to him from the defendant in the action in which the execution upon which the sale was made, was issued, alleging that the goods seized under the writ of execution were upon the land of defendant in possession of his tenant, and that the plaintiff, before making the return upon the writ, had notice of these facts, by which it was claimed he became liable to the defendant to the extent of the goods levied upon. A large number of articles were separately disposed of at the execution sale at which the defendant was a purchaser. Among others, a lot of hogs were sold at so much per choice, for first, second, and third choice, etc., out of the entire lot. The defendant, for the purpose of showing the cause of action in the suit as brought in the justice's court, had the justice sworn as a witness,

when plaintiff objected upon the ground that the docket of the justice was the best evidence. The objection was sustained. It was shown that the defendant had been a bidder for the articles mentioned, and at the conclusion of the sale, a portion of the property having been struck off to him, he stated that he had not any money with him, but would meet the constable on the following day and settle with him. The constable in the mean time retained possession of the property. The sale occurred on the twenty-fifth of October, 1839. The goods were resold by the constable subsequently, defendant having failed to make payment. Upon the day of the second sale the defendant tendered the amount of his bid, but refused to pay the costs incurred in taking care of the property in the mean time. The goods brought more upon the second sale than upon the first, but did not bring enough to discharge the costs claimed, within the sum heretofore mentioned. The cause was brought up upon the following assignment of errors: 1. The court erred in refusing to permit the justice before whom the suit was originally brought, to testify as to what the plaintiff's cause of action was before him; 2. In refusing to permit the justice to state whether his docket set forth the cause of the action correctly; 3. In charging that the articles remained in the possession of the plaintiff, after the sale, under an arrangement to meet at his house the following day for the purpose of settlement, "which was, to receive the money on the one side, and the possession of the goods upon the other;" 4 and 5. In charging that if the parties agreed to meet for the purpose of making payment and delivery, that was a sufficient offer or notice of readiness to deliver to satisfy the rule of law; 6. In leaving it to the jury to determine whether a neglect to make an offer of payment until the day of resale (November 5), could render him liable in damages; 7. In leaving it to the jury to determine whether there was any refusal on the part of defendant to pay for the goods, the evidence of the tender of November 5 being uncontroverted; 8. In charging that if there was no offer on the part of defendant to pay for the goods, plaintiff was entitled to recover; 9. That the charge of the court was ambiguous and unintelligible; 10. In charging that "the usual standard of damages in such cases where there has been a resale, as here, is the difference between the first bid and the price for which the goods eventually sold. This is, perhaps, the safest measure, but the jury may adopt any other if they can find one;" 11. In directing that the costs and expenses of plaintiff in taking care

of the property were a proper subject of consideration in estimating the damages; 12 and 13. In instructing the jury that the defendant could not avail himself of the set-off pleaded; 14. In refusing to charge that the contract of defendant was not complete until he had been notified to make his selection of the articles sold by choice; 15. Covered by the fourth and fifth points; 16. In refusing to charge that the contract was not proved as stated, in that the several purchases of defendant were sued upon as one, instead of distinct contracts. Verdict and judgment for plaintiff.

Lewis, for the plaintiff in error.

Darlington, contra.

By Court, SERGEANT, J. First and second errors. The court, we think, were right in rejecting the parol evidence of the justice to prove what the plaintiff's cause of action was before him. The docket of the proceedings before the justice showed explicitly that the action was brought to recover a deficiency in the sale for account of a former purchaser. This was the best evidence, and parol evidence was not admissible to contradict or vary it. So also the court was right in refusing the evidence of the justice to show whether his docket set forth precisely the cause of action; for that was to be judged of by the docket itself, and not by parol evidence. Also for the same reason whether the cause of action was or was not for the costs of the second sale. The case was before the court on appeal, and the plaintiff had a right to embrace in his claim whatever was within the scope of the demand on the justice's docket.

3. The third error objects to the inference by the court from the evidence, that an arrangement was made between the parties to meet next morning at the house of E. Garrigues, for the purpose of receiving the money on one side, and possession of the goods on the other. It is an inference, we think, fairly deducible from the evidence, as it is difficult to understand what other settlement could take place, considering the terms of sale were for cash, and that the defendant was not then prepared to pay it, but engaged to meet next morning and settle.

4, 5. Nor is there any thing in the fourth and fifth errors, because Rapp's testimony leads to the conclusion, that at the settlement next morning, the plaintiff was to deliver the goods on the defendant's paying the cash. It is ordinarily the business of the purchaser at auction for cash, to pay the money and take away the goods; and the conditions of sale plainly imply that here;

for by them the purchaser is to pay the cash before removal of the goods. If he does not show that he offered to do this; or that the plaintiff prevented it, it seems to me the purchaser is in default. If the plaintiff had the goods ready next morning, and the defendant failed to come and pay for them and take them away (and there is no evidence that he did) the defendant was in default, and without more is liable.

6. The effect of the defendant's offer to comply before refusal or neglect by him, is an abstract point not applicable to this case. There was no proof of the defendant's calling to pay the purchase money on the morning after the sale, according to his agreement, and therefore he was from that time in default. Whether he redeemed himself by the subsequent tender on the fifth of November, depends on another question, whether he then tendered enough to meet the claim of the plaintiff.

7. The averments in this error are, in my opinion, not supported by the facts. There is evidence of a refusal, or what is tantamount, a neglect to pay the cash, according to the terms of sale, either on the day of sale, or the next morning when the defendant was to meet and settle. As to the subsequent tender on the fifth of November, it appears to have been of the amount of the sale only; whereas, it ought to have also embraced the charges the plaintiff had been at in removing and taking care of the goods. The property could not be preserved by the plaintiff without some expense, as it partly consisted of pigs, and they must be fed. If the defendant was in default, by not paying according to the conditions of sale, and in consequence thereof, the plaintiff was obliged to incur expense in taking care of the articles or removing them to a secure and proper place, the defendant is fairly chargeable with this expense. The tender on the fifth of November, therefore, was not sufficient, and the plaintiff was not bound to accept it, but had a right to go on to a resale. The goods, it appears, sold for more than they brought at the first. If that surplus was sufficient to cover the costs and charges the plaintiff had been at, the defendant would not be liable; whether it did, was a question of fact for the jury.

8. In this I perceive no error. .

9, 10. The ninth I pass over, and for the present the tenth.

11. The costs and expenses of the plaintiff in taking care of and supporting the property, were a proper subject of consideration in estimating the damages, as I have before said.

12, 13. It is clear the defendant could not set off in this action to recover damages for his failure to comply with his bid,

a claim against the plaintiff for the amount of rent due to him as landlord, out of the proceeds of sale. These claims are in different rights; and besides, a constable can not move in any sphere but that prescribed by the law, whose agent he is, and from which alone his authority is derived. In suing to recover the amount of the defendant's bid, he represents in some measure the plaintiff on whose execution he sold; and it is from his official station alone, that the relations between him and the defendant have arisen, whatever may be the name in which he sues. In a suit by the landlord against him, he could not be allowed to set off the claim he had for failing to comply with the bid, nor can the reverse be done. Public officers, on grounds of policy, and for the protection of suitors, are not allowed to mingle together the rights and claims in different proceedings at law, either by their own arrangements or by set-off. In *Irwin v. Workman*, 3 Watts, 362, it was held that a sheriff, in an action for money in his hands, can not set off a note given by the plaintiff to his attorney in the execution, and assigned by the attorney to the sheriff. So in *Miles v. Richwine*, 2 Rawle, 199 [19 Am. Dec. 638], it is said, two constables can not agree to set off executions in their hands against each other, inasmuch as such an arrangement would substitute the officer for the defendant; and in *Minich v. Cozier*, 2 Rawle, 113, it is said to be agreed that a defendant in a suit by administrators, is not permitted to set off a debt due to himself from one of the administrators, altogether unconnected with the estate in right of which the suit is brought.

The specific answers of the court involve no other point except the second, which is the fourteenth error.

14. This is unsupported. The contract was complete when the defendant bid off the articles at auction, and became the purchaser according to the conditions of sale. His not performing it by selecting the pigs was his own default. He might have done it at the time of the sale, if he had prepared the cash, or the next morning when he agreed to meet and settle. He can not allege his own neglect, as a reason why he should be exempted from responsibility.

The tenth and sixteenth errors remain.

10. On this subject the court seems to do no more than lay down the rule in *Girard v. Taggart*, 5 Serg. & R. 19 [9 Am. Dec. 327], that a resale is the usual mode of ascertaining the value, but the jury are not bound by this mode of estimation if they can find another more agreeable to truth; a principle which has

been recognized in subsequent cases. Though the language used by the court may at first sight appear dubious, yet, on examination, this, we think, is its fair interpretation.

16. As to this, we think the court below were correct. The point has been decided in *Mills v. Hunt*, 17 Wend. 336, in which the English cases were reviewed; and it was decided, that when the purchase is made at an auction sale of goods, at one and the same time, and from the same vendor, although the articles purchased are numerous, and are struck off separately at separate and distinct prices, the whole constitutes but one entire contract; and the prices of the different articles fixed on are but part and parcel of it. In the decision and reasoning of the supreme court of New York in this case, we concur, so far as respects the sales of personal property at auction; and it fully supports the opinion of the court below.

Judgment affirmed.

RESALE BY VENDOR AFTER BREACH: See *McCombs v. McKennan*, ante, 505.

DEMAND MUST BE DUE IN THE SAME RIGHT TO CONSTITUTE A SET-OFF.—A debt due defendant and another is not a proper set-off in an action for his separate debt: *Richardson v. St. Joseph Iron Co.*, 33 Am. Dec. 460; see also cases cited in the note to *Bunting v. Ricks*, 32 Id. 699.

THE PRINCIPAL CASE HAS BEEN CITED and affirmed upon the following points: Parol evidence is not admissible to contradict a justice's docket: *Clark v. McComman*, 7 Watts & S. 471; *Seibert v. Kline*, 1 Pa. St. 43; sale of separate articles at auction constitutes an entire contract: *Thompkins v. Hass*, 2 Id. 74.

PYLE v. PENNOCK.

[2 WATTS AND SERGEANT, 390.]

IRON-ROLLS AND THE PLATES CONSTITUTING THE FLOOR OF A ROLLING-MILL PASS BY A CONVEYANCE of the mill, though not in reality attached to the freehold, nor is it material that the plates when originally constructed were not intended to be used as flooring, if afterwards put to that use.

ARTICLES CONTAINED IN A MILL OR FACTORY, WHICH ARE INDISPENSABLE THERETO, are part of the realty.

CASE. Pennock assigned all his personal property for the benefit of creditors. Subsequently Pyle purchased at a sheriff's sale of Pennock's real estate "the Laurel rolling-mill and farm." At the time of the sale, the housings of the mill were filled with rolls. There were also other rolls, which had been removed from the housings and were lying about loosely. In the manufacture of iron it is usual to have more rolls than

housings. The floor of the bar-iron mill was covered with plates of defective boiler-iron. It is usual and necessary also, in the manufacture of bar-iron, that the floor should be covered with iron. These plates were kept down by their own weight, and might, at any time, have been removed without injury to any other part of the building. The question presented was, whether the rolls and plates were real or personal property. Judgment for plaintiff.

Darlington and Meredith, for the plaintiff in error.

Lewis and Dillingham, contra.

By COURT. The principle of this case is settled by *Voorhis v. Freeman*, 2 Watts & S. 116 [*ante*, 490]. As regards the rolls, it is that case in terms; and as regards the iron plates, it is stronger still. These constituted the floor of the mill, and were, according to the case stated, an indispensable part of it. It surely would not be thought that a brick floor is not a part of the building, or that the bricks would not pass by a conveyance of it; and the nature of the material of which the floor consists, can not make a difference as to the character of the thing. Of what importance can it be whether the plates were made for a floor in the first instance, or for something else? Stones quarried for the purpose of being used in a wall, would as readily pass as a part of the realty when laid as a pavement, as if they had been otherwise worked up in the building. Nor is it of consequence that these plates were held to the foundation by their gravity. The mill itself was held no otherwise; they were therefore equally a part of it, and passed as such to the defendant below.

Judgment for the plaintiff below reversed, and judgment here for the defendant.

See note to *Voorhis v. Freeman*, *ante*, 494. Cited in *Ross' appeal*, 9 Pa. St. 494, to show that after severance by disunion and sale of articles of machinery, they become personal property; in *Heaton v. Findlay*, 12 Id. 307, to show that a cylinder attached to a furnace and used for the purpose of creating a draught for blowing the fire in the furnace, is a part of the freehold; and the same is true of the lathes in a machine shop: *Christian v. Dripps*, 28 Id. 279. As between landlord and tenant, the intention to annex is the legal criterion: *Hill v. Sewald*, 53 Id. 271. Old and new rails and ties lying along the track of a railroad, for use in making repairs, are likewise a part of the realty: *Covey v. Pittsburg, Ft. Wayne & Chicago R. R. Co.*, 3 Phila. 173. The principal case is cited in all of the cases above referred to.

MCINTYRE v. CARVER.

[2 WATTS AND SERGEANT, 392.]

ARTISAN WHO HAS BESTOWED HIS LABOR UPON PROPERTY HELD BY HIM AS BAILER has a lien thereon, at common law, for the value of his services. **LIEN FOR SERVICES CAN NOT EXIST** in favor of one not having a right of possession.

JOURNEYMAN OR DAY LABORER IS NOT ENTITLED to a lien on property for his services thereupon.

PERSON EMPLOYED TO MAKE THE DOORS FOR A HOUSE by the carpenter engaged by the owner to do the carpenter work thereon, the lumber for the doors being delivered by the owner to the carpenter, and by the latter to the person so employed, the work being done at the latter's shop, has a lien upon the doors, when finished, for the value of his labor.

DECLARATION OF WILLINGNESS TO PAY FOR THE VALUE OF THE LABOR, when the article shall be delivered, is not equivalent to an actual tender by a plaintiff in an action of replevin.

TENDER AFTER SUIT BROUGHT TO RECOVER SPECIFIC PROPERTY UPON WHICH A LIEN for services is claimed, does not entitle plaintiff to his costs, though the tender be of the full amount claimed by defendant, exclusive of costs, and though the sum offered is thereupon accepted.

REPLEVIN for thirty-four panel doors. Pleas, *non cepit* and property in the defendant. Plaintiff being employed by the owner of a house, then in process of erection, to perform the carpenter work thereon, engaged the defendant to make the doors therefor. The lumber was furnished by the owner to plaintiff and by him to defendant. The work was done at defendant's shop. About two months after the completion of the work defendant notified plaintiff that unless the doors were forthwith paid for they would be sold at public sale. Plaintiff then gave notice to defendant that he was ready to pay for them upon their delivery to him. On July 16, 1836, this action was commenced for the recovery of the doors. Upon the ninth day of August following, the plaintiff tendered and the defendant accepted the sum claimed by him for services and labor. The property still remained in defendant's keeping. Verdict and judgment for plaintiff.

Hirst and J. G. Thompson, for the plaintiff in error.

Hopkins, contra.

By Court, GIBSON, C. J. It is not to be doubted that the law of particular or specific lien on goods in the hands of a tradesman or artisan for the price of work done on them, though there is no trace of its recognition in our own books, was brought hither by our ancestors; and that it is a part of our common

law. It was as proper for their condition and circumstances here as it had been in the parent land; and though a general lien for an entire balance of accounts, was said by Lord Ellenborough in *Rushforth v. Hadfield*, 7 East, 229, to be an encroachment on the common law, yet it has never been intimated that a particular lien on specific chattels for the price of labor bestowed on them, does not grow necessarily and naturally out of the transactions of mankind as a matter of public policy. Originally the remedy by retainer seems to have been only co-extensive with the workman's obligation to receive the goods; a limitation of it which would, perhaps, be inconsistent with its existence here, for we have no instance of a mechanic being compelled to do jobs for another. But even the more recent British decisions have extended it to the case of every bailee who has, by his labor or skill, conferred value on the thing bailed to him: *Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 Mee. & W. 349. But as an exclusive right to the possession of the thing is the basis of such a lien, it exists not in favor of a journeyman or day laborer, whose possession is that of his employer, and who has no other security for his wages than the employer's personal responsibility on the contract of hiring; and he who claims it, therefore, must be a bailee under the contract which the civilians call *locatio operis faciendi*.

The defendant below was undoubtedly such a bailee, and entitled to retain his work for the price of it; for though the plaintiff was not the absolute owner of the material delivered, he had power, by virtue of his contract with the owner, to employ whom he would to work it up and thus give room for a specific lien on it, which would be available against both himself and his employer. Indeed, having this material as a master-builder, and consequently having a special property in it, he may be said to have been, for the purposes of his business, the owner of it; and his delivery of it to the defendant to have it made into doors, gave the latter an indisputable lien on it for the price of his work. But it was testified by a witness that it is the custom of the craft when they do piece-work, to bring it home for delivery before the price can be demanded; and the defendant is shown to have offered to pay when the doors should be delivered to him. The existence of such a custom, if it were worth anything, was for the jury under proper direction, and not for the judge who assumed all the circumstances necessary to pronounce that the defendant had not a lien. But taking the custom to have been established, it follows not that

it can supersede the rule of concurrent performance in other cases, which makes tender a condition precedent on the part of him who chooses to take the first compulsory step. Now, though the plaintiff professed a willingness to pay when the work should be brought home, this was not itself a tender, but an offer to close with any tender which might come from the other side; and even the previous profession of a willingness to tender, is not equivalent to an actual tender at the proper time. Before the plaintiff brought his action, he ought to have gone to the defendant and offered him his money; by which he would have left the latter without the shadow of an excuse. He, however, actually tendered it, and the defendant accepted it, after suit brought, and hence it has been suggested that as there was no right of retainer at the time of the trial, there was nothing to stand in the way of a recovery. But the suit was brought before the right of action was made complete, and such a defect can not be cured by any subsequent act except a binding agreement not to take advantage of it; nothing of which took place here, for the money was paid and received without stipulation or terms connected with the pending action. For instance, he who sues on a bond before it is due, must discontinue, pay costs, and begin again at the proper time; and so rigid is the law on this point, that if any part of the cause of action happens to be laid as of a time subsequent to the impetration of the writ, it is good cause to arrest the judgment. The reason is, that a court of law has no power to control the costs; and to allow a demand subsequently due to be recovered in an action brought too soon, would mulct a party who had done no wrong. Now, at no stage of this case, was the defendant a wrong-doer. When the action was brought, he had done no more than exercise his undoubted right of retention; and when his money was afterwards tendered to him, what was he to do? Had he rejected it and continued to withhold the property, he would have become a wrong-doer in earnest, and subjected himself inevitably to the costs of a fresh action. His only course, therefore, was to take the money, and let the plaintiff take the property, and his own course as to the pending suit. The latter, it seems, did not take the property; and he now attempts to recover damages and costs as if he had tendered the price of the work before action brought, though the defendant was at no time in fault. It was error, therefore, to direct that, under the circumstances of the case, the latter had not a lien.

Judgment reversed.

LIEN FOR SERVICES AT COMMON LAW.—At common law the principle was recognized at an early day that the artisan or tradesman who had contributed to enhance the value of goods delivered to his custody, by bestowing his labor thereupon was entitled to a lien upon them for his reasonable charges. Liens of this character are distributed into two classes in the cases relative to them among the earlier reports, viz., general and particular. The former is the right to retain the property of another to cover and secure a general balance of account against him. The latter is the right to retain particular property only for a charge for labor and services bestowed upon it. As intimated in the opinion in the principal case, liens of the former species were thought to be an encroachment upon the common law, and were, in consequence, strictly construed; but the latter, upon the contrary, were not only unquestioned, but were looked upon with much favor: *Rushforth v. Hadfield*, 7 East, 229; *Haughton v. Matthews*, 3 Bos. & Pul. 494; *Bleaden v. Hancock*, 4 Car. & P. 156; *Scarfe v. Morgan*, 4 Mee. & W. 270; 2 Kent's Com., 12th ed., 634. This note will not be extended beyond a general inquiry into the nature, force, and effect of the particular lien above referred to.

Where a person was engaged in a business which required him to receive the property of others when offered to be delivered to him, and to be at trouble and expense in regard to it, he had a particular lien upon the property in his charge for the value of his services. He might retain possession of it until his charges were paid. This privilege was thought to be a just and salutary one, to which those persons were entitled who were engaged in avocations which were either a necessity or an accommodation to the public. It was upon this ground that the particular lien for services at common law was first allowed: *Naylor v. Mangles*, 1 Esp. 109; *Carlisle v. Quattlebaum*, 2 Bailey (S. C.), 452; 2 Kent's Com., 12th ed., 635. Without further reference to the authorities in verification of what is now but little more than a circumstance of legal history, it is very well settled by later decisions that every bailee for hire, who, by his skill or labor, has imparted to the articles delivered to his charge an additional value, has a lien upon them for his reasonable charges, and is entitled to retain possession of them until his charges are paid: *Nevan v. Roup*, 8 Iowa, 207; *Morgan v. Congdon*, 4 Comst. 552; *Grinnell v. Cook*, 3 Hill, 491; *Gregory v. Stryker*, 2 Denio, 631; *Wilson v. Martin*, 40 N. H. 88; *Farrington v. Meek*, 30 Mo. 581. The ancient distinction of which this principle of common law is an outgrowth has since been obliterated, and the right to the lien no longer depends upon the fact whether, from the public nature of his employment, the bailee would have been under obligation to receive the articles in the first instance or not. Where, however, no obligation of that nature exists, the lien is still restricted, with a few exceptions, to those cases in which the bailee has conferred some additional value upon the subject-matter of the bailment. No lien for simply keeping and taking care of property exists, subject of course to the exception before spoken of, where the employment is a public one, and the bailee under obligation to accept the service. Hence, one who merely provides food for, and takes care of an animal, as an agistor or livery-stable keeper, has no lien thereupon for his services in the absence of any special agreement or statute: *Lewis v. Tyler*, 23 Cal. 364; *Grinnell v. Cook*, 3 Hill, 491; *Goodrich v. Willard*, 7 Gray, 183; *Wills v. Barrister*, 36 Vt. 220; although, for the expense and skill bestowed upon a horse delivered to a bailee to be trained for running races for bets and wagers, the latter has a lien: *Harris v. Woodruff*, 124 Mass. 205.

POSSESSION IS ESSENTIAL TO THE CLAIM OF A LIEN FOR SERVICES, and

the relinquishment of possession, if voluntary, operates as an extinction of the lien: *Tucker v. Taylor*, 53 Ind. 93; *Nevan v. Roup*, *supra*; *Oakes v. Moore*, 24 Me. 214; *Ex parte Foster*, 2 Story, 144; *McFarland v. Wheeler*, 26 Wend. 467. Possession being an essential element of the lien, no right to retain exists in favor of a mere employee or workman of the contractor: *Hollingsworth v. Dow*, 19 Pick. 228. The existence of a special agreement between the parties for the payment of a fixed sum for labor is not inconsistent with a claim of lien for services. The doctrine to that effect which at one time obtained ground is no longer regarded as being sound either as a matter of reason or of law: *Mathias v. Sellars*, 86 Pa. St. 486; *Pickett v. Bullock*, 52 N. H. 354; *Morgan v. Congdon*, *supra*. Where, however, a future time for payment is fixed by express contract, the lien is considered to be waived, such an agreement being inconsistent with the right of lien: *Tucker v. Taylor*, *supra*; *Burdick v. Murray*, 3 Vt. 302; S. C., 21 Am. Dec. 588; *Chase v. Wetmore*, 5 Mau. & Sel. 180. If the labor is bestowed upon a quantity of articles under an entire contract, the lien extends to the whole lot and is not restricted to specific portions. As, where a portion of the goods are delivered as fast as completed, the artisan has a right to retain the residue for the whole value of his services under the contract: *Morgan v. Congdon*, *supra*; *Blake v. Nicholson*, 3 Mau. & Sel. 167; *Chase v. Wetmore*, 5 Id. 180. A lien for services is neither a *jus ad rem* nor a *jus in re*, but is a simple personal right of retainer. It is neither assignable, nor subject to attachment as personal property or as a chose in action of the person entitled to it: *Lovett v. Brown*, 40 N. H. 511; *Meany v. Head*, 1 Mason, 319.

COMFORT v. MATHER.

[2 WATTS AND SERGEANT, 450.]

CONDITION IS IMPLIED IN A LEGACY that the legatee shall survive the testator.

LEGACY IS LAPSED BY DEATH OF LEGATEE during the lifetime of testator. TESTATOR'S KNOWLEDGE OF DEATH OF LEGATEE IS IMMATERIAL, if he made no alteration of his will thereafter, although he may have intended that the children of the legatee should take.

INTENTION OF TESTATOR CAN NOT BE ALLOWED TO CONTRAVENE OR ALTER THE LEGAL INTERPRETATION and consequences of his written will, nor are his parol declarations of his understanding of the meaning of his will admissible for that purpose.

DEBT. Comfort, guardian of the minor children of Sidney Eastburn, deceased, brought this action against Mather as executor of the last will of Mary Stackhouse, to recover the amount of a legacy. The will mentioned contained this bequest: "I give and bequeath to Sidney Eastburn, wife of Jonathan Eastburn, the sum of one thousand dollars, to have and to hold to her, the said Sidney Eastburn, her heirs and assigns forever." Sidney Eastburn died on the twenty-third day of April, 1836. The testatrix died upon the twenty-first day of July following. Sidney Eastburn was related to the testatrix by marriage. After

the decease of the legatee, the testatrix said to a personal friend that "Sidney had been a good friend to her," and upon reply being made "you ought to make a present to her children," responded, "they shall never lose anything by me." The defendants obtained judgment and the plaintiff brought a writ of error.

Dickerson, for the plaintiff in error.

Perkins, contra.

By Court, SERGEANT, J. The cases cited by the counsel for the defendants in error are too strong to be got over. They show that the point has been repeatedly and uniformly decided, in conformity with a principle of law, which is said to have been borrowed from the civil law, that every legacy implies a condition that the legatee shall survive the testator, and that where the legatee dies in the lifetime of the testator the legacy lapses. The legislature of this state has, by the act of the nineteenth of March, 1810, corrected the rule where the legacy is in favor of a child or other lineal descendant of the testator, declaring that in such case it shall survive to the issue: but they have not thought fit to go further, and in the present case the bequest is not to a child or lineal descendant of the testator, and therefore remains subject to the prior law. It can make no difference that the testatrix knew the legatee was dead, or intended the children of the legatee should have the benefit of it. The same circumstances occurred in the case of *Sword v. Adams*, 3 Yeates, 34, but the parol evidence was held inadmissible. Its being in the case stated here, can make no difference. The legal construction of a will in writing can not be explained or altered by the parol declarations of the testator, of his understanding of the meaning of the will, or of his intentions to do something else. It is not a case of ambiguity, or mistake of the name of the legatee, or of circumstances such as the law allows to be controlled by parol evidence. The testatrix knew that the legatee was dead, and yet chose to leave the will as it was, to its legal interpretation and consequences, without adopting the measures necessary to effectuate her alleged intentions.

Judgment affirmed.

LAPSED LEGACIES: See *Spence v. Robbins*, 26 Am. Dec. 587, and cases cited in the note.

ADMISSIBILITY OF TESTATOR'S DECLARATIONS to establish or explain his intention. The cases reported in this series upon this subject are collected in the note to *Hoge v. Hoge*, 26 Am. Dec. 61.

Cited in *Flintham v. Bradford*, 10 Pa. St. 91, to show that parol declarations of a testator are not admissible for the purpose of establishing his intention to revoke a former will, which has revived by implication by the cancellation of a subsequent will.

SCHOOL DIRECTORS v. JAMES.

[2 WATTS AND SERGEANT, 568.]

DOMICILE OF A MINOR CHILD IS AT THE DOMICILE OF ITS PARENTS during their life-time, and should the mother survive the father, the child's domicile follows that of its mother during her widowhood.

DOMICILE OF A GUARDIAN IS NOT NECESSARILY THE DOMICILE OF HIS WARD.
PERSONAL PROPERTY OF A WARD CAN NOT BE TAXED in the district in which his guardian has his domicile, where the ward lives with his mother in another district, the father being dead and the mother having since remarried.

ERROR. Francis James, of the borough of West Chester, was appointed guardian of the persons and estates of the minor children of William Gibbons, deceased. The children were living with their mother, who had since remarried, in the township of East Bradford. A tax having been levied upon the personal property of said children, for school purposes, in the borough of West Chester, where the guardian lived, the latter refused payment upon the ground that the property was not taxable in the place of his domicile. It was admitted that if the domicile of the wards was the same as the domicile of their guardian, the property was taxable at that place, otherwise not. Judgment being entered in favor of defendant, it is now assigned by the plaintiff for error.

Lewis, for the plaintiffs in error.

Smith, contra.

By Court, GIBSON, C. J. As this case has no precedent, we must decide it on grounds of reason and analogy; and in order to do so, it is necessary to premise certain principles about which there is no dispute. The domicile of an infant is the domicile of his father, during the father's life-time, or of his mother during her widowhood, but not after her subsequent marriage; the domicile of her widowhood continuing in that event to be the domicile of her child. A husband can not properly be said to stand in the relation of a parent to his wife's children by a previous marriage, where they have means of support which are independent of the mother, in whose place he stands

for the performance of her personal duties, because a mother is not bound to support her impotent children so long as they are of ability to support themselves. Neither can they derive the domicile of a subsequent husband from her, because her new domicile is itself a derivative one, and a consequence of the merger of her civil existence. Her domicile is his, because she has become a part of him; but the same thing can not be said of her children. Having no personal existence for civil purposes, she can impart no right or capacity which depends on a state of civil existence; and the domicile of her children continues, after a second marriage, to be what it was before it. Thus, we see, that when the defendant was appointed guardian of these minor children, their domicile was in the township of East Bradford, where they resided with their mother, if that were important, even after her second marriage; and as the *situs* of their movable property attended the domicile of their persons, it was taxable only there. So far there is no dispute. But as a father, or a mother, *sui juris*, may change the domicile of the child by changing the domicile of the family, provided the change be induced for a disinterested motive—not, for instance, to change the rule of succession in the event of the child's death—the question is whether a guardian or tutor stands in the place of a parent, or has the same power; and it is still a vexed one with the civilians, who are equally divided in regard to it. Those who maintain the affirmative of it, are corroborated by the code civile, which though of positive enactment, is supposed to be founded, in this particular, on the established principles of civil jurisprudence; while those who maintain the negative have, on their side, among others, the authoritative name of Pothier. But the former are supported by the approbation of Mr. Burge, the learned British commentator on the conflict of laws, as well as by the opinion of Sir William Grant, in *Pottinger v. Wightman*, 3 Meriv. 67, and by the decisions of some of the American courts; which would be amply sufficient to turn the scale of authority, were it not for the powerful doubt thrown in on the other side by Mr. Justice Story: “Notwithstanding,” says he, “this weight of authority, which, however, with one exception, is applied solely to the case of parents, or of a surviving parent, there is much reason to question the principle on which the decision in *Pottinger v. Wightman* is founded, when it is obviously connected with a change of succession to the property of the child. In the case of a change of domicile by the guardian, not being a parent, it

is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicile, change the right of succession to the minors' property: Conf. of L. 2d ed., sec. 506, in notes. And there are reasons for this doubt which seem to bear it out. No infant, who has a parent *sui juris*, can, in the nature of things, have a separate domicile. This springs from the status of marriage, which gives rise to the institution of families, the foundation of all the domestic happiness and virtue which is to be found in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom, and as a part of their parents' family; without which, the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community, therefore, they are an integrant part of the domestic economy; and the family continues, for a time, to have a local habitation and a name, after its surviving parent's death. The parents' domicile, therefore, is consequently and unavoidably the domicile of the child. But a ward is not naturally or necessarily a part of his guardian's family; and though the guardian may appoint the place of the ward's residence, it may be, and usually is, a place distinct from his own.

When an infant has no parent, the law remits him to his domicile of origin, or to the last domicile of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a change in the infant's domicile is not necessary to the accomplishment of any one purpose of the guardianship? The appointment of a new residence may be necessary for purposes of education or health; but such a residence being essentially temporary, was held, in *Cutts v. Haskins*, 9 Mass. 543, insufficient to constitute a domicile. But, granting for the moment that a guardian may, for some purposes, change his ward's domicile, yet if he may not exercise the power purposely to disappoint those who would take the property by a particular rule of succession (and nearly all agree that even a parent can not), how can he be allowed to exercise it so as obviously and unavoidably to injure the ward himself? It is true, that what has been said on the subject has had regard to a change of national domicile, and that here we have to do with a supposed change, by implication of law, from one township to another in the same county; but the power of the guardian to do injury can be no greater in the one case than it is in the other. The very end and purpose of his office is

protection; and I take it, that there is no imaginable case in which the law makes it an instrument of injury by implication. Where, indeed, he acts fairly and within the scope of his authority, the ward must bear the consequences, because he must bear those risks that are incident to the management of his affairs; but that is a different thing from burdening him with a loss as a mere technical consequence of the relation. But a guardian can not convert his ward's money into land, or his land into money, except at his own risk; and, for a reason more imperative than any to be found in a case of mere conversion, he must not be allowed to burden his ward with a certainty of loss by subjecting his property to taxation for purposes in which the ward has not an interest. It is said that these minors may receive an equivalent for their contributions to the school fund by participating in the instruction which it was intended to dispense; but the district in which their parents resided, has elected to reject both the benefits and the burdens of it; and to say they are bound by the election made by the inhabitants of their guardian's district, is to assume the ground in dispute—that their domicile has been changed. A guardian has indeed power over his ward's person and residence; but it follows not that the ward's domicile must attend that of his guardian, for there is nothing in a state of pupilage which requires it to do so. We are of opinion, then, that the domicile of a ward is not necessarily the domicile of his guardian; and that the personal property of these children was not taxable by the borough of West Chester.

Judgment affirmed.

PROPERTY HELD BY A GUARDIAN RESIDENT OF ANOTHER DISTRICT of the same county where his ward resides, is taxable for the benefit of the district in which the minor lives: *West Chester School District v. Darlington*, 38 Pa. St. 127, citing the principal case. A trustee can not be taxed upon property held by him in that capacity in another state, though the trustee be a resident of the state of Pennsylvania: *Lewis v. County of Chester*, also citing the principal case.

RELF v. RAPP.

[8 WATTS AND SERGEANT, 21.]

COMMON CARRIER IS LIABLE FOR THE LOSS OF A PACKAGE containing goods of great value, though ignorant of its contents, unless he has limited his liability by a special acceptance.

FRAUD, CARELESSNESS, OR DECEIT OF THE OWNER OF MERCHANDISE by which a carrier is misinformed as to the true character of the contents of a package, and induced to regard it as being of no particular value. and

to become less vigilant and attentive in regard to its security, will excuse the carrier from liability for loss of the goods, it appearing that the package was broken into during the transit, and articles of great value taken therefrom.

SHIPPER IS NOT BOUND ORDINARILY TO DISCLOSE THE VALUE OF GOODS shipped in packages, unless inquiry be made of him by the carrier; but the shipper must not employ means calculated to induce the carrier to believe the goods to be different from what they actually are, or to suppress inquiry as to their character and value.

IF A PACKAGE CONTAINING JEWELRY BE LABELED "GLASS," the label will be presumed to have been intended to apprise the carrier of the true nature of the goods, and to dispense with the necessity of additional inquiry.

CHARGE WHICH TENDS TO MISLEAD THE JURY by inducing them to believe there is but one point of defense, when in truth there are two, and the evidence introduced under the defense upon which no instruction is given is involved in the greater uncertainty, is a sufficient ground for remanding the cause for another trial.

CASE to recover the value of jewelry shipped from New Orleans to Philadelphia by the plaintiff's agent, in the ship Georgian, of which the defendant was the owner. The jewelry, valued at over one thousand six hundred dollars, was contained in a trunk, labeled "William D. Rapp, Philadelphia—this side up—glass—with care." During the voyage, it was broken into and a large portion of its contents purloined. It was shown, on behalf of defendant, that there was nothing in the way bill to indicate that the trunk contained anything but articles of ordinary value; that the price charged for freight was upon the weight alone, and had the value of the contents of the trunk been disclosed, the freight would have been much greater, and the trunk would then have been carried in another portion of the vessel, and additional precautions taken for its safety. The jury was instructed that if a trunk was put on board the ship at New Orleans, containing jewelry, and if, during the voyage, the jewelry, or a part thereof, was purloined, the defendant would be liable, as the plaintiff's case was laid upon the ground of embezzlement; that the captain of the ship was bound to inquire the contents of the trunk, unless deception was used to mislead him; that it was not the shipper's duty to cause the nature and character of the trunk to be placed upon the bill of lading; that the fact of the shipper's having packed watches and jewelry in a trunk and marked it "glass," would prevent a recovery if full information of its contents was not given. Verdict and judgment being in favor of the plaintiff, the following errors were assigned: that the court erred in charging, without any qualification, that if the

goods missing had been embezzled, plaintiff must recover; in charging that the captain was bound to inquire as to the contents of the trunk; in charging that the shipper was not bound to cause to be placed upon the bill of lading the nature and character of the contents of the trunk.

Owens and D. P. Brown, for the plaintiff in error.

Kneass and F. W. Hubbell, contra.

By Court, ROGERS, J. This is an action to recover the value of jewelry shipped by the agent of the plaintiff, at New Orleans, and consigned to him, as is alleged, on board the ship *Georgian*, Eldridge, master, of which the defendant was owner. Defense was made on two grounds: 1. By a denial of any shipment of jewelry, and consequently that none could be embezzled; and 2. Fraud, by concealing from the captain that jewelry was shipped, and fraudulently representing that the trunk contained glass—an article of much inferior value.

On an attentive examination of the charge, we think the jury would be warranted in believing, that, in the opinion of the court, the only material inquiry was, whether the goods had been embezzled; which, of course, includes the question of delivery into the custody of the master of the ship. "In the inquiry whether the goods were embezzled," say the court, "the most important and difficult part is to know whether or not the goods were put on board at New Orleans. The question is, was a trunk containing one thousand six hundred dollars' worth of jewelry put on board at New Orleans? If a trunk containing all the jewelry was put on board there, there can be no dispute that it was not delivered; and if it was purloined, defendants are liable." After calling the attention of the jury to the testimony, the court proceeds to say: "These are the only points I shall call your attention to;" thus leaving the jury to infer, and doubtless they must have so understood it, that the only matter worthy of investigation, was the delivery of the goods, and their consequent embezzlement. If this was the ordinary case of the loss of goods intrusted to a common carrier, there is nothing exceptionable in the charge; but it is not so; for it involves another question, equally as important as the first, attended with equal, if not more uncertainty; that is, the alleged fraud arising from the misrepresentation of the plaintiff's agent. The defendant complains, and with great justice, that the attention of the jury was not called to this part of the defense, in such a manner as to make it a prominent matter for

investigation. The uncontradicted testimony is, that the jewelry, if delivered at all, was contained in a trunk of the kind generally used in carrying shoes, and was labeled "William D. Rapp—glass—this side up—with care." The latter is equivalent to an assertion that the trunk contained glass; and, if untrue, it was such a fraudulent misrepresentation as will prevent a recovery against the owner of the ship, even if the jewelry was purloined by the captain, or any one of the crew. A common carrier is answerable for the loss of a box, or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. Even that principle has been doubted; but the better opinion is, that the carrier would be responsible. And this is reasonable; because he can always guard himself by a special acceptance, or by insisting to be made acquainted with the general nature of the articles, and of their value, before he consents to receive them. If he omits this, he shall not escape responsibility, because of his own negligence. But the rule is subject to a reasonable qualification; and if the owner be guilty of any fraud, or imposition, in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he can not hold him liable for the loss of his goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation he is entitled to, in proportion to the value of the article intrusted to his care, and the consequent risk he incurs; and it tends to lessen the vigilance the carrier would otherwise bestow: 2 Kent's Com. 603. The qualification of the rule is as important to be observed, as the rule. It is absolutely necessary for the protection of carriers; who would otherwise be exposed to great frauds. With what show of justice can a man ask to be paid for an article of great value, when he has induced the carrier, by a false assertion, to believe that it is of much inferior value? It is just, when he asks compensation from the innocent owner, to hold him strictly to his own declarations. He has no right, in order to cheapen the freight, which is the usual inducement, to expose the owner to an increased risk; as must inevitably be the case, where the nature and value of the article are studiously concealed.

I take a distinction between the owner and the wrong-doer; for, undoubtedly, notwithstanding the conduct of the plaintiff, the person who purloined the goods would be responsible for

their value, either criminally or in a civil suit. But it would be unjust to make the owner pay damages for a loss which may have been the consequence of the fraudulent act of the shipper, by inducing a relaxed attention, or may have been perpetrated by a confederate of his own. In addition to the captain and crew, there were passengers on board. Indeed, this is the alleged reason that the bill of lading, and the label on the trunk, were different from the articles which the trunk really contained. In cases of common carriers where there is no notice, the better opinion seems to be, that the party who sends the goods is not bound to disclose their value, unless he is asked. But the carrier has a right to make the inquiry, and to have a true answer; and if he is deceived, and a false answer is given, he will not be responsible for any loss. If he makes no inquiries, and no artifice is used to mislead him, then he is responsible for any loss, however great the value may be: Story on Bailm. 362. But when the shipper voluntarily informs the carrier of the value or of the nature of the article, what need of further inquiry? Surely he can not complain that the carrier believes his statement to be true. If untrue, it would be a violation of every principle of common justice, to cast the responsibility upon the innocent owner, merely because his agent puts faith in the declarations of the shipper. And what difference is there, in effect, between the case put, and labeling a box or trunk as containing an article differing in nature and value from its true character? The one is as likely to delude the carrier as the other, and is as likely to be used as a means of fraud.

After calling the attention of the jury to what it would appear was thought the only matter worthy of consideration, the court say: "I am requested by the defendant's counsel to charge you, that it was not the duty of the captain of the ship Georgian to ask what were the contents of the trunk, confided to his charge, at New Orleans, that it was the duty of the shipper to cause to be placed on the bill of lading the nature and character of the contents of the trunk; that the shipper having put jewelry and watches in a trunk ordinarily used for carrying shoes, and marked it 'glass,' would prevent a recovery, if full information was not given of its contents." To these questions the court answer: "If the captain wished to know what was in the trunk, he was bound to inquire, unless deception was used to mislead him; that it was not the shipper's duty to put upon the bill of lading the nature and character of the contents of the trunk. And if it was so marked, and no communication made of its

contents, it is answered affirmatively." It can not be said that these answers, taken together, are wrong in the abstract; yet we can not but feel that they are not such answers as were calculated to give the desired information to the jury, and that connected with the remarks before made by the court, they tended to divert the attention of the jury from the turning-point of the cause. It was his (the captain's) duty to inquire the contents of the trunk, unless deception was used to mislead; but what the deception was, is not explained. The court should have instructed the jury, that if they believed what was not disputed, that the trunk was marked "glass, this side up with care," he was not bound to inquire the contents of the trunk; that the assertion of the shipper, that it contained glass, dispensed with any further inquiry as to its contents. The party has a right to a plain and intelligible answer, predicated on the facts in evidence. And if after giving the charge a fair construction, it tends to mislead the jury, by inducing them to believe that there is but one point of defense, when in truth there are two, and the point omitted the most uncertain, the cause should be remanded for another hearing. The trunk being labeled "glass," it is incumbent on the shipper to explain, why it was so marked; and this the witness has endeavored to do, by saying it was purposely so done, for reasons given by him, and that the contents of the trunk were made known to the captain. But this, which is the debatable ground, is positively denied; and some circumstances exist on both sides, which give a color of truth to the respective statements. Whilst it is admitted, that public policy requires that common carriers should be held to an extraordinary responsibility, it is necessary to watch, with increased vigilance, the conduct of the owner of the goods. It should be free from the suspicion of fraud or deception. The carrier is in the nature of an insurer, and he has a right to a true account of the character and value of the goods he insures, and has a right to be protected against imposition or misrepresentation of the nature and value of the articles intrusted to his care.

Judgment reversed, and a *venire de novo* awarded.

LIABILITY OF CARRIER WHEN GOODS ARE NOT ENTERED and paid for according to their value: *Cole v. Goodwin*, 32 Am. Dec. 470. The question of the power of a carrier to limit his liability by notice is discussed in the note to that case.

Cited in *C. & A. R. R. Co. v. Baldauf*, 16 Pa. St. 78, to the point that a shipper is not bound to disclose the character and value of a parcel unless inquired of by the carrier, in which case he must answer truly; cited also in *Pa. R. R. Co. v. Berry*, 68 Id. 278, upon the point that if a charge as a whole tends to mislead the jury it is error.

PUGH v. GOOD.

[8 WATTS AND BERGRANT, 56.]

PART PERFORMANCE OF PAROL CONTRACT FOR THE SALE AND CONVEYANCE OF LAND entitles either party to the right to demand a specific performance thereof.

DELIVERY OF POSSESSION TO A VENDEE pursuant to the contract is a part performance.

POSSESSION OF A LESSEE OF THE VENDEE IS ALSO THAT OF THE LATTER, and the equitable estate thereby created may be taken in execution upon a judgment against the vendee.

THOUGH THE FOURTH SECTION OF THE STATUTE OF FRAUDS OF ENGLAND, upon which the doctrine of the effect of part performance of a parol contract for the sale of lands is founded, is omitted from the statute as enacted in the state of Pennsylvania, yet that doctrine as declared by the courts of chancery in England is recognized as a part of the law of that state.

APPEAL. In 1835, Good entered into a contract with Yerkes for the purchase from the latter of a lot of land. The contract was a verbal one, in pursuance of which Good entered into possession. Upon the twenty-ninth of June, 1836, Evelina Burson recovered a judgment against Good for the sum of two hundred and seventy-five dollars. Upon the first day of April, 1837, Yerkes executed a deed to Good for the property embraced within the parol contract mentioned above. Upon the fifth day of July, 1837, Pugh, the appellant, recovered a judgment against Good for three hundred and thirty-five dollars. Both judgments being duly entered, the lot was sold under a writ of *venditioni exponas*. Evelina Burson claimed the right to have her judgment first satisfied out of the proceeds. It was admitted that in that case there would be no money out of which to satisfy the judgment of Pugh. The lower court granted a rule in favor of Evelina Burson to show cause. Pugh appealed.

Ross, for the appellant.

Dubois, *contra*.

By Court, GIBSON, C. J. It requires but a glance at the decisions of this court, to see that we have, from the first, implicitly followed the decisions on the British statute of frauds, as guides to the interpretation of what we supposed to be our own. The British statute, though prior to Mr. Penn's charter, seems not to have been considered as extended to Pennsylvania; and our own statute was enacted so late as 1772; yet it may be doubted whether before that time a legal estate of freehold might not have been created here by livery and seisin, or by a

parol conveyance. However that may be, we find, in *Thomson v. White*, 1 Dall. 426 [1 Am. Dec. 256], which was determined in 1789, Chief Justice McKean, copiously quoting the decisions on the British statute, and declaring, in accordance with their spirit, that as the act of assembly, as well as the statute, was made to prevent frauds equally with perjuries, it should be expounded liberally and beneficially, "for the suppression of cheats and wrongs." "Whether the courts of chancery," said Chief Justice Tilghman, in *Ebert v. Wood*, 1 Binn. 218 [2 Am. Dec. 436], "have gone further than they ought, in thus giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to inquire, because the principles I have mentioned have been adopted by this court, and long considered the law of the land; and to question them now, would shake many titles acquired under their authority." "It is too late," said Mr. Justice Yeates, in *Smith v. Patton*, 1 Serg. & R. 84, "to inquire, at this day, into the propriety of our adoption of the British decisions, that agreements, in part executed, are taken out of the statute of frauds and perjuries. Statutes made to prevent frauds, are not designed to protect them. Wanting a court of chancery, we have admitted its rules in certain cases, to prevent an absolute failure of justice, although we differ in the mode of relief. A system has thus grown to maturity, established by repeated decisions, and recognized by the constitution, as the chancery powers usually exercised in the courts of law." Other *dicta* of the sort might be cited; but as the judges whose sentiments I have quoted were among the foremost of those who laid the foundations of our jurisprudence, I submit that their authority alone ought to restrain us from catching at an accidental difference of enactment, in order to sever our interpretation, in other respects, from that of the British chancellors, on a supposition, whether founded or not, that they went originally too far, especially as our legislature, in following the words of their statute, as far as the circumstances of our property would permit, must have had in view the benefit to be derived from a settled construction. That the British construction was, in fact, adopted, is shown by the preceding quotations; and, indeed, we can not open one of our cases on the subject, without being satisfied of the fact, that no difference between part performance under the original statute, and part performance under our imperfect copy of it, has before been attempted; or without seeing that British precedents, for such a case, have been as freely appealed to as our own. The only apparent ex-

ception to this, is found in *Todd v. Pfoutz*, 3 Yeates, 179, in which it was said, that the English cases of specific performance are not strictly applicable to agreements of considerable standing here, where lands are less stationary in value than they are in an old country; but that was evidently said with a view, not to what constitutes part performance under the statute of frauds, but to laches which would induce a chancellor to withhold his assistance from the execution of the contract, independently of it.

But, as regards part performance, what reason was there for a difference of construction originally? Our statute is a transcript of the first three sections of the British act; but what is thought to be of importance is, it omits the fourth section, which declares, that "no action shall be brought to charge any person, upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them—unless the agreement, on which such action shall be brought, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him properly authorized;" and hence it is thought, by some, that there is less occasion for departing from the letter, here, than there is in England, where an action at law for the breach of the contract is prohibited. But was it ever doubted, that if the contract had never been decreed specifically, compensation must necessarily have been given, as an equivalent for it, by the courts of equity, to which the letter of the section did not extend? Those who object entirely to the doctrine of specific execution for part performance, do so on the ground that the proper relief would be compensation, in all cases, and nothing else. Such, at least, was the notion of Lord Alvanley, in *Forster v. Hale*, 3 Ves. 713. Had, therefore, the fourth section of the British statute been enacted here, compensation must have been attainable in our courts by an equitable action, not indeed "upon the contract," as forbidden by the statute, but collateral to it; and as readily as it could be by a bill in equity, for which we have often made such an action a substitute; for no community could long bear the oppression of an unflinching enforcement of this section. The justice of this remark is put in a strong light, by Mr. Justice Huston, in *Clarke v. Vankirk*, 14 Serg. & R. 354. I take it, therefore, that an equitable action to restore the parties to their former condition, would have lain from the necessity of the case.

But what is of infinitely more importance is the undoubted fact, that it is exclusively on the prohibitory effect of this same

omitted section that resistance to specific execution for part performance has ever been made in the British courts; on what prohibition it has been made in ours is nowhere distinctly asserted; but the want of a statute foundation for such resistance, certainly does not add to its force. I know not whether this very material fact has occurred to the profession. I incline to think that no difference of enactment betwixt the British statute and our own in regard to executory sales of land, has been suspected; yet nothing is more certain than that the whole doctrine of part performance rests on this fourth section in the British courts, for no other part of their statute makes writing essential to the validity of such sales. The first section, indeed, like our own, declares estates created by livery and seisin, or by parol, to be of no greater effect in law or in equity, than estates at will; but that plainly regards conveyances or contracts executed, and not contracts executory, whose enforcement requires the power of a chancellor. Mr. Roberts, Mr. Newland, and perhaps every other writer on the statute have arranged the cases on the subject of part performance under the fourth section, while the cases of conveyances executed have been arranged by them under the first. The one annuls a parol agreement for a written conveyance, while the other annuls a parol bargain and sale which had been entirely valid during the interval between the statute of uses and the statute of enrollments: 2 Inst. 675; and which, by reason of the customs and privileges of certain boroughs, had not been entirely cut up before the act in question: Roberts on Frauds, 270. Nor did any act at the time of our own statute of frauds require all conveyances in Pennsylvania to be in writing without exception. But that the fourth section is the one which bears on executory sales of land in England, is shown by *Whitbread v. Brockhurst*, 1 Bro. Ch. 416, in which the case was made to turn distinctly on it, and in which Lord Thurlow said, "that though this clause of the statute declares that no action shall be sustained on any contract or sale of land unless the agreement shall be in writing, and attended with the forms therein required, yet that the court had adopted the provisions of the statute so far as to permit it to be pleaded to bills for the performance of agreements:" S. P., 1 Pow. on Con. 270. No English lawyer would have thought of putting such a case on any other foundation; and had it not been for the existence of that section, we should never have heard of an objection to the specific enforcement of a sale of land, merely because the agreement rested in parol. Yet I would not have it thought for an

instant that such an agreement must necessarily be enforced here in all cases, or that it does not stand on the same footing by force of our decisions, as it does in England by force of the statute. I would account for the existence of the doctrine here as we account for that provision of the third and fourth Anne, which gives the drawee of a promissory note an action on it, though the other parts of that statute have been supplied by an act of our own; and like that provision, I would hold the particular clause in the fourth section of the British statute of frauds to have been extended here by adoption, had not this court, very inconsistently, I think, held it otherwise in *Bell v. Andrews*, 4 Dall. 152.

As it is, we must take that clause with its equitable exceptions to be part of our peculiar common law adopted in analogy to the British statute, as we take the doctrine of charitable uses to be adopted in analogy to the statute of that name; or if it must necessarily have a statute foundation, we must forcibly engraft it on that clause of our act which limits the effect of a parol conveyance to the creation of an estate at will, though there be great difficulty in doing this; for though the words are that such an estate shall have no greater effect "in law or equity," the purpose was not to prevent chancery from adding the legal title to an equitable estate; for the legislature were dealing, not with an agreement, but with what was already a legal title. Beside, if the purpose had been to prohibit a parol agreement, it would have been equally attained by declaring it invalid at law, as was done by the fourth section of the British statute; and the addition of the words "in equity," seems to be one of those redundancies which are common in the language of legislation. But whether we take the doctrine of part performance to be an emanation from the interpretation of the omitted British section, or an exception to the letter of our own; it is certain that no positive injunction is more unnecessarily violated by it here than it is in England. Indeed, the difficulty with us is not so much to avoid such a violation, as to discover any rule of positive enactment which might be the subject of it; and our courts ought not, therefore, on that account, to feel themselves the more trammelled in the administration of equitable relief.

Now though it was held by this court in the case of *Allen's Estate*, 1 Watts & S. 383, that delivering possession of a portion of the land, is not part performance, and though it seems to have been conceded there that delivery of the whole would be so, yet the point has not till now come before this court directly

for adjudication. Considering the question then to be an open one as respects our own decisions, it is a concession to those who doubt the propriety of specific performance in every case, to put it on the basis of the fourth section of the British statute, but for which, a parol contract of sale might be enforced, whether it were partly executed or not. But the authorities make short work with the question even on that ground. It would be a waste of time at the end of one hundred and fifty years from the first enactment, to pass the cases in review in order to arrive at its interpretation, when their results have been so carefully collected by the text-writers. Now that delivery of possession alone is part performance, has been affirmed in 1 Pow. on Con. 299; Newland on Con. 181; Sugd. on Vend. 105; 1 Fonb. 175; 1 Madd. Ch. 303; Rob. on Frauds, 147; 4 Kent, 451; and 2 Story's Eq. Jur., c. 18, sec. 761. "Whether possession be an unequivocal act amounting to part performance," said Lord Manners in *Kine v. Balfe*, 2 Ball & B. 174,¹ "must depend on the transaction itself. If it be distinctly referred to the contract alleged in the pleadings, I think no case has denied that it is part performance: the defendant is protected from liability as a trespasser, and the plaintiff is disabled from dealing with any other person." After the concurrent opinions of such men, brought down, as in the last case, to a recent period, it would be presumptuous in me to defend the cases on original grounds; but it is proper to remark, that one of the arguments against making possession part performance, is weakened here, instead of being strengthened by the absence of the omitted section; for if it be necessary in England to break through the statute in order to prevent the vendee from being made a trespasser, how much more readily may parol evidence be admitted here, where there is no express prohibition of the contract in those sections of the statute which we have adopted. Certainly nothing is said in them about a written memorandum of the bargain signed by the party to be charged; the want of which has been the obstacle to specific performance in the English cases; and if the contract may be proved by parol to found an action for damages on it, why may it not be proved by parol to found a decree of specific execution on it? It was because the British statute forbade the courts of law to sustain an action on it, that the court of chancery thought the remedy by bill for performance within the equity of prohibition; and where there is no express prohibition for the one purpose, there can be no implied prohibition for the other.

1. 2 Ball & B. 343.

But this is returning to ground already explored. Sir William Grant, however, seems, in *Buckmaster v. Harrop*, 7 Ves. 431,¹ to have rejected the argument drawn from the protection of the vendee, and to have considered that the application must come from him by whom the agreement has been partly performed; but *Whaley v. Bagnel*, 6 Bro. P. C. 45,² on which he relied, does not bear him out; for though the bill which was dismissed in that case was by him who had not done the acts, they were evidently preparatory to the formation of the contract, and not done in part performance of it; so that the result must have been the same had the application come from the other side. Beside, it is not easy to see how a vendee who has taken possession on the faith of the vendor, is not as much defrauded by being turned out in winter or subjected to mesne profits and the costs of an ejectment in case of resistance, as he who delivered it would be by a rescission on the contract; and it is still more difficult to see, upon the all-pervading principle of mutuality which governs a chancellor wherever he is left at liberty to act on principles of general equity, why the contract would be executed in behalf of the one party, if it would not be executed in behalf of the other. Such is the principle of *Bromley v. Jefferies*, 2 Vern. 415, in which equity refused to execute a covenant by a daughter's father that her husband should have his estate for one thousand five hundred pounds less than any other person would be willing to give for it, because the husband was not bound to take it at any price; and for a similar reason it was held in *Flight v. Bolland*, 4 Russ. 298, that a suit for specific performance can not be maintained by an infant. So a son's bill to enforce a covenant by his father who was tenant for life, was dismissed in *Armiger v. Clarke*, Bunb. 111, because the son himself was not bound. The only exception to the principle is one which has been made by the positive words of the omitted section of the statute under consideration, which declares it to be sufficient in the case of a written agreement that it be signed by the party to be charged; but the consequent dispensation with the principle of mutuality, though perhaps unavoidable, was censured by Lord Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, as an unnecessary departure from the general principle. Such a case, however, is an exception which proves the rule, and furnishes no precedent for a case in which the agreement is not pretended to be in writing or signed by any one, and which the words of the statute do not embrace. The dis-

1. 7 Ves. 341.

2. 1 Bro. P. C. 345.

inction attempted by Sir William Grant, therefore, is groundless; and the vendee as well as the vendor may insist on a specific execution of the contract for part performance by delivery of possession alone.

As a criterion, no objection can be made to it which may not as plausibly be made to possession with payment of purchase money or expenditure in improvements superadded. Though the possession be shown to have been given in reference to some existing contract, it is true that the terms of the bargain must still be proved by parol; and hence the fears of perjury which were entertained by the framers of the statute. But would not the same necessity for parol proof of terms, and the same danger of perjury exist, if the purchase money were paid or improvements were made? If loss of possession may be compensated, so may expenditure, the difference being only in the degree; and it is conceded on all hands that it is proper to go beyond compensation wherever a rescission of the contract would be a fraud. Now it is absolutely necessary to establish some definite measure of part performance, or abandon the remedy by specific execution altogether; for there would be neither stability of decision nor security of title without it; and nothing seems so well adapted to the end, or so little susceptible of perjury, as the notorious and unequivocal act of parting with the possession.

We therefore see no obstacle in the way of falling in with the current of the English decisions, by holding delivery of possession pursuant to the contract to be the test of part performance; and what remains to be done, is to apply it to the circumstances of our case. The vendee did not himself take actual possession; but it was shortly afterwards taken by one to whom he had leased the premises, and who had been the agent of the vendor to deliver the possession to the vendee. Having performed his office in the first place, he was at liberty to become the vendee's tenant in his own right; and as his possession was that of his lessor, there was an equitable estate in the latter which was bound by the subsequent judgments. The money in court, therefore, was properly awarded to Evelina Burson, the senior judgment creditor.

Decree affirmed.

PART PERFORMANCE OF PAROL CONTRACT FOR SALE OF LANDS will enable the vendor to bring an action thereon: *Linscott v. McIntire*, 33 Am. Dec. 602, the note to which contains the cases heretofore reported in this series.

EFFECT OF DELIVERY OF POSSESSION TO ENTITLE PARTY to specific performance of parol contract for sale of lands. The principal case is followed

in *Williams v. Landman*, 8 Watts & S. 55; *Ross' appeal*, 9 Pa. St. 497; *Reed v. Reed*, 12 Id. 121; *Moore v. Small*, 19 Id. 467; *Rider v. Maul*, 46 Id. 378; the delivery of possession must be open and notorious: *Brawdy v. Brawdy*, 7 Id. 160; cited also in *Murphy v. Hubert*, Id. 424, to show that a trust in relation to land may be created by parol.

WHITE v. HOPKINS.

[3 WATTS AND SERGEANT, 99.]

HOLDER OF A BILL OF EXCHANGE WHO HAS RECEIVED OF THE DRAWER A NEW BILL for a part of the amount and has given time to the drawer to pay the balance, does not thereby release the acceptor, though the latter accepted the bill merely for the accommodation of the drawer, of which fact the holder was informed.

FORMAL RELEASE OF DRAWER BY THE HOLDER OF A BILL OF EXCHANGE is no release of the acceptor, unless such discharge of the holder was made in consideration of payment or other satisfaction by which the bill was, to all intents and purposes, paid.

ASSUMPT. Action upon a bill of exchange drawn upon White in favor of Hopkins and accepted by the former. The bill was drawn by one Foster. The defendant filed an affidavit of defense, setting forth that the bill had been accepted solely for the accommodation of Foster, which fact was known to the holder, and that Hopkins had, since the acceptance by defendant, received the draft of Foster upon other parties for a portion of the amount of the bill and had agreed to wait six months for the balance. Judgment for plaintiffs was entered upon the insufficiency of the facts disclosed in the affidavit.

Meredith, for the plaintiff in error.

Hood, *contra*.

By Court, **KENNEDY, J.** The plaintiffs in error were sued in the court below, upon their acceptance of a bill of exchange, which was done without consideration, merely for the accommodation of J. E. Foster, the drawer. The bill bears date at Philadelphia, the twenty-third of March, 1839, and directs the defendants, J. White & Co., to pay, six months after the date thereof, to the order of Hopkins & Brother, the plaintiffs, the sum of eight hundred and fifty-three dollars and twenty cents. The suit was brought to December term, 1839, of the court below; and the defense set up was, that the bill was accepted by the defendants below, without consideration, and solely for the accommodation of the drawer; that the plaintiffs below, with

a full knowledge of this fact, on or about the twenty-eighth of January, 1840, accepted and received from the drawer of the bill, his draft on Reynolds & Mosier for two hundred and seventy-one dollars on account of the said bill, and agreed with the drawer to wait six months for the balance or residue of said bill, which six months would not expire until the end of July following. The court below, however, was of opinion that this matter formed no bar to the plaintiffs' further maintenance of their action, and therefore rendered a judgment in their favor. It is admitted by the counsel for the plaintiffs in error, that the defense set up below does not go to discharge or release them from all liability on their acceptance, but that they are entitled, under it, to claim the same indulgence, for making payment of the bill, that was granted by the defendants in error to the drawer, by virtue of their agreement made with him on or about the twenty-eighth of January, 1840. It would indeed be vain to claim that they were released thereby; for it would be running counter to the principle settled by this court in the case of *The Montgomery Bank v. Walker*, 9 Serg. & R. 229; 12 Id. 382. There it was ruled, that the holder of a negotiable note did not discharge the drawer by giving time to the indorser, although the holder knew at the time he obtained the note, by discounting it, that it was drawn exclusively for the accommodation and benefit of the indorser. "We," says Chief Justice Tilghman, in delivering the opinion of the court, "assume this broad principle, that the man who draws a promissory note for the purpose of negotiation must stand to it. He has placed himself in the situation of principal, and shall not afterwards escape, by alleging that he was but a surety:" 12 Serg. & R. 383. What is here said of the accommodation drawer of a negotiable note, may be predicated of the accommodation acceptor of a bill of exchange. The acceptor is the principal in the latter case, and must be looked to first for payment, before recourse can be had to the drawer: *Heylyn v. Adamson*, 2 Burr. 674; Doug. 249;¹ *Smith v. Knox*, 3 Esp. 47; *Clark v. Devlin*, 3 Bos. & Pul. 366; *Philpot v. Briant*, 4 Bing. 720; *Pownal v. Ferrand*, 6 Barn. & Cress. 442. Therefore if the holder of a bill of exchange, accepted for the accommodation of the drawer, takes a *cognovit* from the drawer for payment by installments, he does not thereby discharge the acceptor; whether he, at the time of taking the bill, knew it was an accommodation bill or not: See *Fentum v. Pocock et al.*, 5 Taunt. 192. In general, the liability of the acceptor can not be

1. *Dingwall v. Dunster*.

released or discharged, otherwise than by agreement, release, or payment: See Chitty on Bills, 339, and the authorities there cited. Hence even a formal release of the drawer, by the holder of the bill, will not discharge the acceptor from his liability to the holder, unless such release be founded on payment, or satisfaction, made in some way, by the drawer to the holder. Seeing, then, that the acceptor can not claim a discharge from the release given by the holder to the drawer, it is difficult if not wholly impossible to discover upon what principle he can claim to have any indulgence, in regard to the payment of the bill, that may be given by the holder to the drawer, extended to himself. For the reason why the release shall not inure to the benefit of the acceptor, is, because he has chosen to make himself the principal debtor, the one to whom the holder must first look for payment; and thus to make the drawer merely a surety to the holder, so that the last may therefore deal with the drawer, who is the surety, as he pleases; and it can not in any way prejudice or injure the rights of the acceptor. Beside, what is the difference in principle, I would ask, between a release forever from payment of the bill, and a temporary indulgence granted for that purpose, to the drawer? The former is an absolute and unlimited dispensation or exemption from payment of the bill forever; whereas the latter is a limited or qualified dispensation from the payment of it. And it would certainly be strange if the acceptor could claim the benefit of the one and not the other. We therefore think the judgment ought to be affirmed.

Judgment affirmed.

ACCOMMODATION ACCEPTOR NOT DISCHARGED BY INDULGENCE TO DRAWER:
See *Lambert v. Sandford*, 18 Am. Dec. 149; *Clopper v. Union Bank*, 16 Id. 294.
See also note to *Bank of Montgomery v. Walker*, 11 Id. 717.

CASES
IN THE
COURT OF APPEALS AND OF ERRORS
OF
SOUTH CAROLINA.

FELDER v. BONNETT.

[2 McMULLAN'S LAW, 44.]

NEW TRIAL WILL BE GRANTED MORE READILY FOR ERROR IN DECIDING QUESTIONS OF LOCATION of boundary lines, inasmuch as such questions are legal in their character.

NATURAL BOUNDARIES PREVAIL EXCEPT WHEN THEY ARE ENVELOPED IN DOUBT, in which case artificial marks, though of inferior degree, will have effect.

SURVEY CALLING FOR A BOUNDARY DESIGNATED AS "DEAN SWAMP," includes the land to the flowing stream or current of the swamp where such exists, and does not extend merely to the external line of the low and marshy ground.

DECLARATIONS OF A TENANT IN POSSESSION AGAINST HIS INTEREST are evidence against a party claiming under him, but his declarations after he had parted with his interest are not admissible.

DECLARATIONS OF A PARTY AFTER A CONVEYANCE OF LAND BY HIM respecting the location of a boundary line are not admissible against his successor in interest.

TRESPASS to try title. The plaintiff derived title from William Hall. The calls in plaintiff's deed were for "Dean swamp" upon one side and for the "edge of Edisto swamp" upon the other. It was insisted by plaintiff that the run or flowing creek of Dean swamp was intended, and not the edge of the swamp. Objection was made to the admission of Hall's declaration, made after his deed to plaintiff, that his line did not run to the creek, which being overruled was also assigned as error. Verdict and judgment for plaintiff. Defendant moved for a new trial.

T. W. Glover, for the motion.

Whitmore, contra.

By Court, O'NEALL, J. Questions of location approximate so nearly to purely legal questions, that a new trial is more readily granted for error in them, than in any other class of cases, depending upon facts. For rules of location are legal rules, and the facts to which they are to be applied, are often of such a character, that there can be no mistake in judging here of their effect. The first rule of location is, that natural boundaries are to prevail unless there may be some doubt about them, and this doubt is certainly removed by artificial marks. In such a case, the latter, although of inferior degree, will have effect. In the case before us, the survey of William Hall calls for Dean swamp, as its north-east boundary. The only difficulty which could arise, would be, whether the surveyor called for the swamp of the creek, or the creek itself, by the name of Dean swamp. If there were any artificial marks, which would lead us to conclude that the surveyor stopped at the margin of the swamp, then we would be at liberty to adopt it as the boundary; but, in their absence, what is meant by Dean swamp, must be decided by the known and established understanding in this state. The meaning may be ascertained by appealing to the usage even of Orangeburgh, in this behalf. Besides Dean swamp, they have many others, such as Bull swamp, and Coccaw swamp. This name is appropriated to the run, and not to the swamp. In large streams, such as Santee and Edisto, the swamp is spoken of as distinct from the river, but in creeks with a margin of swamp, the usage is universal in this state, to speak of the creek and swamp as one. In this case, however, I do not think there is any difficulty; for the surveyor showed that he intended to go to the run, by the different manner in which he called for the southern boundary. He there calls for the edge of the South Edisto swamp. When he calls for the north-east boundary he calls for it as Dean swamp, and represents the stream, and, indeed, judging from the face of the plat, it appears that the corner stands on the bank of the stream.

In *Coats v. Mathews*, 2 Nott & M. 99, Little Saluda, in Edgefield district, was represented as lying within the southern line of the survey. It was held, that the river thus represented must control the location. So, here, the grant to William Hall must be located by the run of Dean swamp. It is true, in following the stream, the grant to Clarke is found to run beyond

the creek; and, as that is an older grant, the rule governing the location of Hall's grant, is to follow the run of the creek, until the line of Clarke's survey is reached, and then to follow the lines of Clarke's survey, until they carry the survey back to the creek, which is then to be pursued to South Edisto swamp.

When this is noticed properly, it explains Hall's declarations. For it was on the line M. Q., which is identical with the line of Clarke's grant, that Hall said he did not run to the creek. This was the fact at that point, for Clarke's grant intervened. But we do not think Hall's declarations were competent evidence. They were made after he had conveyed. The rule is, that the declarations of a tenant in possession, or a grantor, before he conveys his interest, may be given in evidence: *Turpin v. Brannon*, 3 McC. 261. After a grantor has conveyed, he may be sworn to impeach his own title, for, in that case, he testifies against his own interest, and this shows, at once, that his declarations can not be evidence. The question in this behalf, is like that arising in a suit upon a note of hand, when it is passed away, and the declarations of the payee, after he parted with his interest, are attempted to be given in evidence. In *Lightner* ads. *Martin*, 2 Id. 214, it was ruled, that they were inadmissible. In *Lester v. Martin and Patrick*,¹ Id. 241, it was ruled, that declarations made by the indorsee, before he parted with the note, were competent; and, in that case, Judge Nott stated the true rule: "The declarations, acts, etc., relating to the matter in dispute, made by a person while he is interested, is good evidence against a party claiming, subsequently under such person."

The motion for a new trial is granted.

J. S. RICHARDSON, JOSIAH J. EVANS, and A. P. BUTLER, JJ., concurred.

EARLE, J., absent.

NATURAL BOUNDARIES, WHEN CONTROLLED BY MONUMENTS AND OTHER MARKS: See cases cited in the note to *Suffern v. McConnell*, 32 Am. Dec. 444. As to lands bounded by a line described as following a body of water, see *Lynch v. Allen*, Id. 671 and note; *Newman v. Foster*, 34 Id. 98 and note.

PAROL EVIDENCE TO ESTABLISH BOUNDARY: *Newman v. Foster*, *supra*. Declarations of party in possession, when admissible against those claiming under him: *Beecher v. Parmele*, 31 Am. Dec. 633, and cases cited in the note.

1. *Snelgrove v. Martin*.

GADSDEN v. LANCE.

[1 McMULLAN'S EQUITY, 87.]

GOODS CONTRACTED FOR ARE NOT WITHIN THE STATUTE OF FRAUDS when they are not in existence at the time of the contract or where some act remains to be done to put them in a condition to be delivered.

NO NOTE OR MEMORANDUM IN WRITING IS NECESSARY OF AN AGREEMENT depending upon a contingency which may or may not happen within a year.

CONTRACT TO TRANSFER SHARES OF STOCK when the same may be opened to subscription upon the books of a corporation, is not within the meaning of any provision of the statute of frauds.

BILL in equity. Complainant sold to defendant his right of subscription to certain shares of stock in a corporation when the same might be issued and opened for subscription upon the books of the corporation. It was agreed that complainant should transfer to defendant the shares of stock as soon as the same were issued by the corporation. The agreement was made in February, 1837. The stock was issued in 1839. Complainant subscribed for the stock and offered to make the transfer to defendant, but the latter refused to take the stock or to pay the agreed price. Complainant brought an action at law for damages, but as the agreement was known only to the parties, the complainant being unable otherwise to obtain evidence, prays a discovery by bill in equity. Plea, statute of frauds. The plea being overruled and defendant directed to answer, the latter appealed.

Simons, for the appellant.

Hunt and Thompson, contra.

By Court, JOHNSON, Chancellor. It seems at one time to have been doubted whether stocks fall within the description, "goods, wares, and merchandises," used in the seventeenth section of the statute of frauds. In *Pickering v. Appleby*, Com. 354, cited at length in Com. on Con. 89, the court of common pleas were equally divided on the question, whether stocks of the governor and company of the copper mines in England, were or were not within the statute, and in *Colt v. Netterville*, 2 P. Wms. 308, the Lord Chancellor King reserved the question, whether York building stock was or was not within the statute, declaring that all the judges of England were divided upon it, in *Pickering v. Appleby*; the point was too difficult for him to determine; and decided the cause upon another ground. But

in *Mupell v. Cook*,¹ the lord chancellor expressed the opinion that South Sea stock was within the statute.

It is not probable that at the time the statute was passed, stocks were so generally the subject of traffic in England as at this day, and were probably almost unknown here, when in 1712 it was incorporated in our statute book; and it may be that neither the parliament of Great Britain, nor our legislature, had them in contemplation at the time; nor are the terms used the most apt that might be selected to describe them; but it is notwithstanding true, that there is nothing in this country or in England, not even a bale of goods, more commonly the subject of traffic, barter, and exchange, and the fluctuation in the price is frequently greater than in goods, and the dealers in them are exposed to all the temptations to perjury against which the statute is intended to provide. But it is not necessary to settle the question here.

Conceding that stocks are merchandise, the question is whether the defendant is bound. In addition to what has been said in the circuit court decree, it will only be necessary to add, that it is now the settled rule, that when the goods contracted for exist *in solido* and are capable of delivery at the time, it is within the statute; but where they are to be made, or something is to be done to put them in a condition to be delivered, according to the terms of the contract, it is not within the statute. The cases of *Towers v. Osborne*,² *Clayton v. Andrews*,³ and *Groves v. Buck*,⁴ referred to in the circuit decree, furnish examples of the rule. The work and labor to be done, or the expense to be incurred, enters into consideration, and in that consists the distinction; without the work, labor, or expense, however trifling, there is no contract.

It is equally well settled, that when the agreement is to be performed on a contingency which may or may not happen within the year, a note in writing is not necessary, unless it appears from the agreement that it was to be performed after the year: *Peter v. Compton*, Sken. 353; *Fenton v. Emblers*, 3 Burr. 1278; *Moore v. Fox*, 10 Johns. 254 [6 Am. Dec. 338]; *Cruikshanks v. Burrell*,⁵ 18 Johns. 58.

The contract set out in this bill, is that on the fourth of February, 1837, the complainant undertook that he would transfer to defendant his right of subscription, to one hundred shares of the new stock, as soon as books should be opened for sub-

1. *Musell v. Cooke*, Pr. Ch. 533.

2. Str. 506.

3. 4 Burr. 2101.

4. 3 Mau. & Sel. 178.

5. *Cruikshank v. Burrell*.

scriptions for the same, and the defendant undertook to pay him thirty-three dollars for each share; and it is averred that on the opening of the books in January, 1839, the complainant subscribed for the one hundred shares, and tendered an assignment of them to the defendant, which he refused to accept or pay for. Now the act incorporating the bank, left it entirely discretionary with the bank to increase its capital or not, and the time in which it might be done is only limited by the duration of the charter, nor is there anything in it to control the bank in opening its books for subscriptions to the community at large, or limiting it to the stockholders. The new stock was not in existence at the time of the contract; it depended on the contingencies: 1. That the bank would increase its capital; 2. On the time when it might open books for subscription; and 3. Whether it would or would not limit the subscriptions to the stockholders; and until all this had been done, there was nothing which complainant could transfer or assign to the defendant. The books for subscriptions were opened to the stockholders alone, and to enable the complainant to perform his part of the agreement, he was obliged to subscribe for the stock, and for which, of course, he was bound to pay. Here then, the thing contracted about, was not at the time in *rerum natura*; the time of performance not limited by the contract beyond the year, and might have happened in a month; an act to be done by the vendor; the subscription for the stock, and his liability to pay for it, which but for the contract might not have been done.

Appeal dismissed.

WM. HARPER and J. JOHNSTON, Chancellors, concurred.

CONTRACT WHICH MAY BE PERFORMED WITHIN A YEAR is not within the provision of the statute of frauds relative to time: *Linscott v. McIntire*, 33 Am. Dec. 602, and cases cited in the note.

RAMSAY v. JOYCE.

[1 McMULLAN'S EQUITY, 236.]

CONVEYANCE BY A FEMALE IS FRAUDULENT if made prior to and upon the eve of her intended marriage, and after a treaty of marriage had been entered into.

SUCH A CONVEYANCE DERIVES NO VALIDITY from the fact that its object was to make provision for the children of the grantor by a former marriage.

A LIMITATION IN A WILL OVER OF A LIFE ESTATE TO TESTATOR'S WIFE to the effect that if she shall have an heir at the time of her death, the es-

tate shall descend to that heir, is a limitation in favor of any child which the wife may have, either by the then existing or any subsequent marriage, the word "heir" in the connection in which used in this case evidently not being employed in its technical sense.

INJUNCTION IS NOT A PROCESS WHICH IS EFFECTUAL to prevent the removal of personal property from the state.

COSTS INCURRED BY A GUARDIAN in an action to determine the validity of a deed affecting the property in which his ward has an interest, are to be paid out of the property of the ward.

BILL in equity. John Ramsay being the owner of a tract of land at the time of his death, left a will containing the following provisions: 1. A life estate in the land was given to his wife; 2. Providing that in the event of the death of the wife without issue, the property should be distributed among his next of kin; 3. That in case his wife should have an heir, before her death, the whole estate should descend to such heir. His wife was appointed executrix, and was duly qualified. Testator had no children at the time of his death, but the plaintiff, his daughter, was born a short time thereafter. Testator died in 1825. In 1832 his widow married the defendant Joyce. Eighteen days before her marriage to Joyce she conveyed to the daughter, by her former marriage, plaintiff in this action, all her real and personal estate, with but a slight reservation. The deed of conveyance was executed after the marriage between herself and Joyce had been agreed upon, and without the latter's consent. The bill alleged that defendant Joyce was about to carry away a portion of the property, and prayed an injunction. Bill dismissed. Complainant appealed. The questions raised are as to the validity of the deed to plaintiff and the rights of plaintiff under her father's will.

B. F. Perry and H. Henry, for the complainant.

By Court, **HARPER**, Chancellor. The jury having found that the deed in question was made without the knowledge of the intended husband, and it being certain that it was made in contemplation of marriage, and after an actual engagement to that effect, it only remains to inquire, whether such a deed can be supported. The remarks of Chancellor Johnston, in the decree of 1839, perhaps comprehend all that is necessary to be said on the subject; but as the subject is a new one in our courts, it has been thought proper to make a further investigation of authorities. Of the general rule, that a voluntary conveyance made by a wife, pending a treaty of marriage, and with a view to it, without the knowledge of the intended husband, is void as a fraud

on the marital rights, has never, I believe, been questioned. And though it is said by Lord Chancellor Brougham, in *St. George v. Wake*, 1 Myl. & K. 610, that the doctrine rests more upon *dicta* than actual decision, he himself does not question it. The case of *Carleton v. Millington*, 2 Vern. 17, where in contemplation of marriage the wife conveyed to trustees, in trust, to dispose of the property as she should direct; and that of *Goddard v. Snow*, 1 Russ. 485, where, ten months before the marriage, but still with a view to it, the wife had conveyed in like manner; and, as it is said, that of *Havord v. Hooker*,¹ 2 Rep. in Ch. 81, seem to be decisions, and expressly in point. It is recognized in *Ball v. Montgomery*, 2 Ves. jun. 191; in *Strathmore v. Bowes*, Id. 22;² and indeed, in all the cases which have been supposed to introduce a modification of it. The modification contended for, is, that if the object of the conveyance is to make a provision for the children of a former marriage, this will be supported. The law is found so expressed in some of the elementary books; and *dicta* to that effect may, perhaps, be found in some of the reported cases. But all these, I believe, are derived from the case of *Hunt v. Matthews*, 1 Vern. 408. In that case, according to the original report, the wife had assigned over the greater part of her estate, in trust, for the children of her former marriage; and the chancellor is reported to have said, that she might, with a good conscience, provide for children of the first marriage. But Mr. Cox, in the notes to his edition, corrects the report from the register's book, and states that the assignment was known to the second husband before the marriage: *Blithe's case*, Freem. 91, has been relied upon. There the wife assigned a lease of three pounds, annual value, in trust, for herself for life, with remainder to her daughter. It was said by the court, that, being a thing of small value, and there appearing no marriage treaty, nor any contemplation of this lease, the deed might be supported. In that case, too, the wife had received the income for her life, and, after her death, the daughter, during the life of the husband, and the bill was brought by his administrator, to set the conveyance aside, and the court might very well have thought that the acquiescence of the husband was evidence of its fairness, and that his representative should not impugn it. In *King v. Cotton*, 2 P. Wms. 674, it was in evidence, that the conveyance was made before the treaty of marriage, in the most public manner—at an entertainment given to tenants—and though the court speaks of the mean circumstances

1. *Howard v. Hooper*.

2. 1 Ves. 22.

of the husband, and of his not offering to make any settlement, yet certainly, these circumstances were not necessary to the decision. In *Strathmore v. Bowes*, though executed a very short time before the marriage, the settlement was before the treaty of marriage with the defendant. It was made in contemplation of marriage with a former suitor, with his knowledge and consent. In *St. George v. Wake*, the chancellor decided upon the ground that there was no concealment, and that the deed was probably known to the husband. He argues, however, that in such cases the question must always be of actual fraud; that the cases seem to authorize the taking of all the circumstances into consideration; the circumstances of the husband, as to pecuniary means, etc.; but the one thing needful is fraud; fraudulent concealment. No other case besides this furnishes any ground for the exception to the general rule, which is supposed to exist, when the conveyance is to provide for children of a former marriage, rather than for a stranger. These *dicta*, or this reasoning of Lord Brougham, seem to afford the only ground for what is said by Mr. Justice Story, in his commentary on equity jurisprudence; that though the secret conveyance of the woman, in favor of one for whom she was under moral obligation to provide, will be void, yet, "if she only reasonably provides for her children by a former marriage, under circumstances of good faith, it would be otherwise." It is to this case, and that of *King v. Cotton*, that he refers for authority.

As to what is said in our own reported cases, *Lyles v. Lyles*¹ and *Jones v. Cole*², they can hardly be called *dicta*. Laying down the general law, that a voluntary conveyance made, pending a marriage treaty, without the knowledge of the husband, is void, they add—unless it be to provide for children. This can hardly be said to express an opinion that there is such an exception in favor of children. In *Terry v. Hopkins*, 1 Hill Ch. 1, Chancellor De Saussure questions the doctrine, and quotes the reasoning of Roper, in his law of husband and wife, that if the conveyance is to be avoided on the ground of fraud on the husband, it is equally fraudulent, whether in favor of children or any one else. But certainly no case or *dictum* supports the notion, that every conveyance making provision for the children of a former marriage, shall be valid; and it would be difficult to find a stronger case against the deed than in this instance. It was made after the marriage engagement, and a month before the actual marriage, privately, at the house of her father, with

1. Harp. Eq. 288.

2. 2 Bail. 330.

the knowledge only of kindred and inmates; it was of her whole property, to a child already well provided for, and the husband had a fortune adequate to her own. Under these circumstances, it is impossible that the deed should stand, and such is the judgment of the court. My individual opinion would be, that there is no distinction, whether the conveyance be to children or to a stranger, and that it would introduce great uncertainty into the law, if we should set about to determine, according to the circumstances of every case, what is, or is not, a reasonable provision for children. A reasonable provision is that of which the intended husband will approve. It is, in every case, in the power of the intended wife to communicate her intention to provide for her children to the husband; and if it be in fact reasonable, and he should refuse his consent, and break off the treaty upon this provocation, she will have reason to congratulate herself. To leave it in the power of women to make such secret dispositions on the eve of marriage, would be injurious, not a benefit to them. Nothing would be more likely to create conjugal unhappiness after the marriage, of which we have an unfortunate instance in the present case. It is the familiar law, that the husband is regarded as a purchaser of the wife's property, and that marriage is a valuable consideration. As said by the chancellor in *Strathmore v. Bowes*, "the law conveys the marital rights, because it charges him with all the burdens which are the consideration he pays for them." In this case, the defendant, since his marriage, has paid off a debt contracted by his wife before her marriage, for part of the property included in her conveyance. Now, suppose, a person should convey for a pecuniary consideration, property of which he had before conveyed a part to his children, could there be any question of the fraud? A person in debt making a voluntary conveyance, is presumed to intend fraud on his creditors; and his moral obligation to provide for his children will not cure the transaction, if the conveyance be to them. As said by Roper, if the secret conveyance of the wife be void on the score of fraud on the husband, it can make no difference whether it be in favor of children or any one else. It is hardly necessary to say, that the court can not afford the relief prayed for by the second ground of appeal. With respect to the third ground, and the injunction which has been granted in the case, it may be well to explain that they are entirely misconceived. The practice of granting injunctions against the removal of property from the state, which has sometimes obtained, is entirely inefficient and

irregular. An injunction is for the purpose of restraining proceedings in another court within the state, or to restrain some act in relation to landed property, which can not be removed from the state; and if the party disobeys, the court may always find and punish him by its process. If there be ground to apprehend that a party will not abide a decree of the court, the proper process to compel him to do so, is the writ of *ne exeat*. If, upon the hearing, there appear sufficient grounds to apprehend that a tenant for life will remove the property from the state, the court will compel him to give security for its forthcoming at the termination of the life estate. But if the court should merely enjoin him not to remove the property, he might remove himself and the property too, and entirely evade the jurisdiction. With regard to the propriety of compelling the tenant for life to give security in the present case, we concur with the chancellors; but if any such intention should hereafter appear, the complainant will be at liberty to apply for a *ne exeat*. The fourth ground is sustained. It was certainly no violation of the duty of a guardian to obtain the judgment of the court on an instrument, in which his ward had, apparently, so material an interest; and it would be hard and unusual to burden him with costs. By paying costs out of the *corpus* of the property, they will be borne by the tenant for life and the complainants entitled in remainder, according to their respective interests. This is ordered accordingly, and in other respects the decrees are confirmed.

DAVID JOHNSON, J. JOHNSTON, and B. F. DUNKIN, Chancellors, concurred.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

JOHNSON v. BROWN.

[2 HUMPHREYS, 327.]

NO GENERAL PRINCIPLE IN REGARD TO MULTIFARIOUSNESS can be extracted from the cases; on the one hand, multiplicity of actions is to be avoided, and on the other hand, the blending in one suit of distinct and incongruous claims and liabilities.

A BILL IS BAD FOR MULTIFARIOUSNESS which joins as parties defendant a partner, the firm of which he is a member, the several trustees to whom they have separately assigned property in trust for the benefit of creditors, and the creditors respectively affected by the deeds of trust.

PRACTICE ON DEMURRER FOR MULTIFARIOUSNESS.—On the sustaining of a demurrer for multifariousness, the complainant may dismiss as to those whose joining made the bill bad, and proceed as to the rest. But, if he appeals without so doing, the appellate court on sustaining the lower court can only dismiss the bill without prejudice.

BILL in chancery. General demurrer alleging multifariousness. Demurrer sustained. Complainant appealed. The opinion discloses the character of the multifariousness.

Mumford, for the complainant.

Searcy, contra.

By Court, **REESE, J.** The bill alleges that the complainant obtained a judgment at law against Brown for upwards of three thousand dollars, that an execution was issued, and *nulla bona* returned thereon. That Brown, to secure creditors, had made a deed of trust, conveying to one Hill, as trustee, a large amount of real and personal property; that a sale of the property was

made by the said trustee, Hill, and that various persons became purchasers at the sale of the property. The bill alleges, that the deed of trust was fraudulent and void as to complainant, and that the purchasers had notice thereof at the sale, and are affected thereby; and it prays that the said deed and sale be set aside, and that the said Brown, the said trustee, Hill, the creditors, secured by said deed, and the purchasers at the said sale, be made parties to the suit. The bill also sets forth, that the said Brown and one Smithers, are partners in trade, under the firm and style of Brown & Smithers, and that he had obtained against them a judgment at law, for a considerable sum (which is stated), that an execution was issued thereon, and was returned *nulla bona*. That said Brown & Smithers, to secure certain creditors of theirs, had conveyed by a deed of trust to one Clarkson, as trustee, certain property therein mentioned; that said deed of trust is fraudulent and void as to the judgments and claims of the complainant, and prays that it be set aside, and that the said Brown & Smithers, and the trustee in said deed, and the creditors secured thereby, be made parties defendant to the suit.

The defendants have all joined in demurring to the bill for multifariousness. The chancellor saw fit to sustain the demurrer and to dismiss the bill, and the complainant has appealed to this court.

Mr. Justice Story has justly remarked, that numerous as are the cases upon this subject, no principle can be extracted from them, that can be safely adhered to as a general rule, but the courts must determine each case upon its own peculiar circumstances. While multiplicity of actions on the one hand, ought to be avoided, we should be careful, on the other, to guard against that complication and confusion in the investigation of rights, and the application of remedies, arising from the attempt to blend in one suit, distinct and incongruous claims and liabilities. The interest and liability of defendants may be separate, and yet they can be joined in the same suit. But, then, their liability must flow from the same fountain; their interests radiate from some common center; as if they have distinct portions of complainant's distributive share, or have purchased severally and each for himself from complainant's testator separate portions of his trust property, and in such like cases. It is upon this principle, perhaps, that the judgment in the case of *Fellows v. Fellows*, 4 Cow. 682 [15 Am. Dec. 412], can be maintained, if at all maintainable. In that case, several per-

sons, at distinct times and without confederation with each other, had fraudulently purchased separate portions of property of B., the debtor of A., and who had a judgment against B. It was held, that a bill filed against all, was not multifarious. B., the common and fraudulent vendor to all the defendants, was the debtor to A., and constituted a common connecting link, a central point to all. That case goes further than any of which we are aware. But it does not go far enough to vindicate the bill before us from the objection of multifariousness brought against it in the demurrer.

The complainant has a judgment at law against Brown; the latter makes a deed of trust to secure certain creditors, and a sale takes place under said deed, and there were divers purchasers of separate articles of property. If the deed of trust and the sale be fraudulent, the complainant with proper averments, may well make Brown, the trustee, the creditors intended to be secured by the deed of trust, and the purchasers at the sale which took place under it, parties defendant to the same bill; because Brown, the debtor of the complainant, is the source and origin of all their claims, the common center, the connecting link between the complainant and all the defendants. But this ceases to be the case when you go a step further, to the judgment against the firm of Brown & Smithers; to the deed of trust to secure the creditors of the firm. When you make Smithers, the trustee in the last-mentioned deed, and the creditors of the firm, parties to the same bill filed against the trustee, creditors and purchasers under the deed first set forth, there ceases to be any common center, any one connecting link. The rights and liabilities do not spring out of or radiate from any one point or person. The creditors of the firm have no connection with the creditors and purchasers under Brown, and it would not be expedient or proper that their interests and liabilities should be involved in the same suit.

We think, therefore, that the demurrer was properly sustained; but we regret that the complainant did not upon the demurrer being sustained, move the chancellor to dismiss his bill as to Smithers and those claiming under the firm or partnership deed of trust, and to retain the suit as to the others. We suppose it would have been proper for the chancellor, if thus moved, so to have ordered. But as the complainant has placed himself before us upon the question raised by the demurrer, and the decree thereon, we apprehend that we are at liberty to do no more here, than to dismiss the bill, in consequence of

affirming the chancellor's decree, which we reluctantly do, but without prejudice.

IN REGARD TO MULTIFARIOUSNESS and to the rules for determining the same, see the note to *Fellows v. Fellows*, 15 Am. Dec. 412, and *Stuart's Heirs v. Coalter*, Id. 731; *Robinson v. Smith*, 24 Id. 212; *Grimstone v. Carter*, Id. 230; *Varick v. Smith*, 28 Id. 417.

RIGS v. CAGE.

[2 HUMPHREYS, 350.]

PRINCIPAL'S DEATH REVOKES AGENT'S AUTHORITY instantly, and acts of agent done after the principal's death in ignorance of that fact, and in good faith, are void.

ASSUMPSIT against Cage's administrator to recover the value of goods sold to one Bledsoe, the agent of the firm of which Cage and another were members. Cage died before Bledsoe bought the goods, but the fact of the death was then unknown to him and to plaintiffs. Verdict for the defendant. Motion for new trial being overruled, plaintiffs appealed.

• *McLanahan*, for the plaintiffs.

Searcy, contra.

By Court, GREEN, J. The only question in this case is, do the acts of an agent performed after the death of the principal, in pursuance of authority previously given, and in ignorance of the death of the principal, bind the representative of the latter?

The general principle of the common law is, that an authority conferred by letter of attorney, must be executed during the life of the principal: 1 Bac. Ab., tit. Authority E. The death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest: 2 Kent's Com. 645.

In this case, William Cage, the defendant's intestate, was dead when the goods were purchased in Philadelphia by Bledsoe, the agent. They have never come into the hands of the administrator, but were received by the surviving partner and appropriated by him. Let the judgment be affirmed.

REVOCATION OF AGENT'S AUTHORITY BY DEATH OF PRINCIPAL: See *Harper v. Little*, 11 Am. Dec. 25; *Staples v. Bradbury*, 23 Id. 494.

BROWN v. DICKSON.

[2 HUMPHREYS, 395.]

A LEVY OF EXECUTION IS VOID FOR UNCERTAINTY when made in the following words: "Levied on lot No. —, in the town of Greenville, with its improvements," and the sale conveys no title.

EJECTMENT. The question involved is stated in the opinion. Verdict for the plaintiff. The motion for a new trial was overruled. Defendant appealed.

J. A. McKinney, for the plaintiff in error.

Lucky, contra.

By Court, TURLEY, J. The question presented in this case is, whether a levy of an execution in the following words is sufficiently certain, viz.: "Levied on lot No. —, in the town of Greenville, with its improvements." In the case of *Vance v. McNairy*, 3 Yerg. 171 [24 Am. Dec. 553], it is held, that a levy on land is sufficiently certain, if it describe it in such a manner as to distinguish it from all other tracts owned by the same person.

In the case of *Pound v. Pullen's lessee*, 3 Yerg. 338, the levy was in these words: "levied on eight thousand acres of land, lying in four different tracts." This levy was held to be void for uncertainty. The judge in delivering the opinion of the court, says: "This levy is bad for its vagueness and uncertainty; its location is not more definite than the bounds of the county of Stewart" (the county to which the execution was issued), "and this restriction is only arrived at by implication, because the power of the sheriff did not extend beyond these bounds. The levy ought to show the location of the lands levied on to a reasonable certainty. This case, we think, is in point and must govern the one under consideration.

The levy in the case of *Pound v. Pullen's lessee*, according to the exposition of the court, is this: "Levied on eight thousand acres of land, lying in four different tracts, in the county of Stewart." The levy in this case, is "levied on lot No. —, in the town of Greenville, with its improvements." If the first be void for uncertainty, surely the last must be also. What tracts of land were levied on in that county? We know not. What lot was levied on in the town of Greenville? We know not. The levy in the first case, would cover any eight thousand acres of land, lying in four different tracts in Stewart county; and the levy in the last case, would cover any lot, with improvements, in the town of Greenville. This view of the case is not

in conflict with the case of *Parker v. Swan*, in 1 Humph. [34 Am. Dec. 619]. There the levy shows to whom the land belonged, the quantity of acres, and the location, to wit, the waters of the west fork of Stone's river. Now it is impossible that there can be any uncertainty in this levy, unless by accident there should be two tracts of land owned by the same person, containing the same precise number of acres, and having the same location; a thing not to be supposed. We are therefore of the opinion, that the court below erred, in receiving the sheriff's deed, based upon this levy as a muniment of title in the plaintiff in ejectment, and that it ought to have granted a new trial. The judgment will, therefore, be reversed, and the case remanded for further proceedings.

SHERIFF'S RETURN OF EXECUTION should describe the land levied upon with sufficient precision to enable it to be identified: *Duvall v. Waters*, 18 Am. Dec. 350; *Berry v. Griffith*, Id. 309; *Swan v. Parker*, 27 Id. 522; *Marshall v. Greenfield*, 29 Id. 559, and note; *Gilman v. Thompson*, 34 Id. 714; *Parker v. Swan*, Id. 619 and note.

BULLARD v. COPPS.

[2 HUMPHREYS, 409.]

STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A TENANT who has disclaimed his landlord's title, until notice of the disclaimer is brought home to the landlord.

IT IS CHAMPERTOUS FOR A TENANT to sell the land in his possession at any time after the fact of his disclaimer is known to the landlord.

NATURAL BOUNDARIES CONTROL NUMBER OF ACRES, especially where the number is stated with a "more or less."

EJECTMENT. The opinion states the case. Verdict for the plaintiff. Defendant appealed.

J. A. McKinney and Peck, for the plaintiff.

Cocke, contra.

By Court, GREEN, J. This is an action of ejectment. On the trial, the court, among other things, charged the jury, "that if the proof satisfied them, that Powell was in as the tenant of Copps, and Bullard came in by collusion with Powell or under him, that Bullard would in law be considered as the tenant of Copps, and that Copps would not be bound, nor would the act against champerty be operative to show any title against him, until he (Bullard) had held adversely to Copps for seven years, after his disclaimer known to Copps."

In this part of the charge, the court erred. Although it is true, that a tenant can not resist his landlord, by virtue of the statute of limitations, until after the expiration of seven years from the date of his disclaimer and adverse holding, yet it does not follow, as the court seemed to suppose, that the statute against champerty will not apply until after the expiration of seven years. The moment the disclaimer of the tenant is known to the landlord, his possession becomes adverse, and this adverse possession continuing seven years, the statute of limitations forms a bar to the landlord's recovery. But it does not require any length of adverse possession, to make a sale and conveyance of the land so possessed by another, champertous. The fact, that it is adversely held, is enough. And that fact occurs in the case of a tenant, so soon as his disclaimer is known to the landlord.

2. The deed from Bullard to Copps, calling to begin "at the ford of Clinch river, known by the name of Copp's ford, on the north side of said river, running up the different meanderings of said river to the first gut below where William Hunter now lives, for compliment," "containing one hundred acres, more or less," includes all the land Bullard owned above the said ford, to the gut aforesaid. And, therefore, the land in dispute is included in the deed from Bullard to Jacob Copps, and in the one from Jacob Copps to lessor of plaintiff.

Let the judgment be reversed, and the cause be remanded for another trial.

TO SET THE STATUTE RUNNING AGAINST THE LANDLORD and in favor of the tenant, the adverse holding must be notorious: *Doak v. Donelson*, 24 Am. Dec. 485; *Duke v. Harper*, 27 Id. 462; *Camp v. Camp*, 13 Id. 60; and see *Chambers v. Pleak*, 32 Id. 78 and note.

CHAMPERTY DEFINED AND CONSIDERED: See note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 308, 319; *Falls v. Carpenter*, 28 Id. 592; *Floyd v. Goodwin*, 29 Id. 130; *Varick v. Jackson*, 19 Id. 571; *Tuttle v. Jackson*, 21 Id. 306.

IN REGARD TO NATURAL OBJECTS CONTROLLING COURSES in a deed, see *Heaton v. Hodges*, 30 Am. Dec. 731 and cases in note; *Newman v. Foster*, 34 Id. 98 and note; *Frost v. Spaulding*, 31 Id. 150 and note.

"MORE OR LESS" IN DEEDS: See *Jolliffe v. Hite*, 1 Am. Dec. 519; *McCoun v. Delaney*, 6 Id. 635; *Smith v. Evans*, Id. 436; *Nelson v. Matthews*, 3 Id. 620; *Pendleton v. Stewart*, 2 Id. 583; *Whaley v. Elliot*, 10 Id. 737; *Aschom v. Smith*, 21 Id. 437.

BRADLEY v. COMMISSIONERS.

[2 HUMPHREYS, 428.]

AN ACT ESTABLISHING A COUNTY IS UNCONSTITUTIONAL where the boundaries do not contain the number of acres prescribed by the constitution.

QUO WARRANTO IS THE COMMON LAW MODE of redressing an evil like that of seeking to establish a county under an unconstitutional act; but now by a bill in chancery any one aggrieved may enjoin the proceedings.

BILL for an injunction. The case appears from the opinion.

J. A. and R. McKinney, for the complainants.

Peck, contra.

By Court, **TURLEY, J.** This bill is filed by the complainants, to enjoin the defendants from organizing the county of Powell, the establishment of which is directed by the act of 1839, c. 192. The fourth section of the tenth article of the constitution of the state, provides for the establishment of new counties, to consist of not less than three hundred and fifty square miles and to contain not less than four hundred and fifty qualified voters. The proof in the case shows conclusively, that the boundaries of the county do not contain the constitutional number of three hundred and fifty square miles, but much less; and the question is, whether the commissioners can be prohibited by the decree of a court of chancery, from organizing the county contrary to the provisions of the constitution.

The convention of the state, which formed the constitution, thought proper to place restrictions upon the power of the legislature to establish new counties; and of consequence, any attempt to do so, contrary to the restrictions, is a void exercise of power, which can and must be stopped by the judicial department of the state. There is no other place to which an appeal can be made, and if the courts can not interfere, the constitution, if violated, is a dead letter. But it is said, that the true remedy for this evil, is by writ of *quo warranto*, and not by injunction. To this we answer, if the courts have the power to remedy the evil, that remedy, which, under all the circumstances, will be most effectual, is the one which ought to be resorted to, if there is nothing in the mode of administering the law prohibiting it.

That the writ of *quo warranto* is the common law mode of redressing such grievances is admitted, and that it was the only one which could have been used, before the system of chancery jurisprudence was established upon its present broad and substan-

tial basis, is not denied. But that this remedy is inefficient, for the purposes desired, can not be controverted. The writ of *quo warranto* is not a prohibitory writ, and before the question arising under it could be determined, much mischief could and would be done by the organization of the county, the thing sought to be prevented, and no subsequent action of the court could, by possibility, place the parties concerned, in their original, uninjured condition. It is this inability of courts of law to operate prospectively, by prohibition, for the prevention of mischief, that has established upon clear and definite grounds, that portion of chancery jurisdiction which rests upon the doctrine of *quia temet*. It embraces a great variety of interests, which we need not, and do not design to investigate here. It sufficeth for this case, to say, that it always applies, where great and irreparable mischief may be the consequence of illegal action, which the common law courts, from their mode of proceeding, can not stay; such we think this one to be. If the establishment of the county be unauthorized, its organization ought to be prohibited, and this, no court, but one of chancery, can do.

It is submitted, whether one or two private individuals can seek the aid of a court of chancery for this purpose?

We think that any person aggrieved, by the proceedings, may apply for the remedy.

Let the decree of the chancellor be affirmed.

QUO WARRANTO: See this writ discussed in the note to *People v. Rensselaer R. R. Co.*, 30 Am. Dec. 33.

GOODRUM v. CARROLL.

[2 HUMPHREYS, 490.]

BOND EXECUTED BY PUBLIC OFFICER, not good as a statutory bond, may be good as a voluntary obligation upon which an action can be maintained.

DEED DELIVERED TO STRANGER FOR THE USE OF THE OBLIGEE into whose hands it subsequently comes is good from the time of the delivery to the stranger.

BOND ACCEPTED BY THE OBLIGEE AT THE TIME OF THE PLEA is the bond of the obligor.

COVENANT. The opinion states the case. Verdict and judgment for the plaintiff. Defendants appealed.

Meigs, for the plaintiff in error.

Goode, contra.

By Court, GREEN, J. The bond upon which this suit was brought, was executed by the defendants to William Carroll, governor of Tennessee, and his successors in office, in the penal sum of ten thousand dollars, conditioned that T. C. Porter, who had that day been appointed sheriff of Giles county, should faithfully execute and perform the duties of that office.

The evidence is, that this bond was written by the deputy clerk of the county court, and was signed by the defendants in the office of the clerk of that court, and left upon the table, from whence it was taken by said deputy, and filed away among the papers of that office where it had remained, except when it had been applied for and used by attorneys, in this case and in other cases against these defendants. Porter was qualified and acted as sheriff, and as such received an execution in favor of Foley against Field, upon which he received the money, but had failed to pay it over, or return the *fi. fa.* This was not an office bond according to the statute, because the penalty is ten thousand dollars, instead of twelve thousand dollars, as required by the statute, and because it was not approved and recorded as the statute directs. It has been decided by this court, 10 Yerg. 465,¹ and is admitted, that a bond executed by a public officer, and securities, though not good as a statutory bond, may nevertheless, be binding as a voluntary obligation, upon which an action at common law may be maintained: 3 Dev. 384;² 4 Id. 270.³

The only question seriously urged in this case, is as to the delivery of this bond. If a deed be delivered to a stranger for the use of the obligee, and he afterwards receive it, it is good from the time of the delivery to the stranger: Shep. Touch. 57, 58; Co. 225, note w. If a bond be accepted by the obligee at the time of the plea, it is the deed of the obligors: 3 Rep. 28;⁴ 5 Id. 119.⁵ In this case, the bond was executed by the plaintiffs in error, under the belief and persuasion, that it was a good statutory bond, and consequently, with the intention, that it should be kept for the use of Carroll, to be sued on, as an office bond. As to the actual fact of such intention, no one can doubt. But if it turn out that they were mistaken, that it was not a valid office bond, can that legal construction of the instrument change the effect of their intention in its execution and delivery? Surely not. The facts are immutable, however parties may be mistaken as to legal consequences.

The only question then is, has Carroll received it? We think the commencement of the suit on the bond, and the production

1. *Hibbitts v. Canada.*

2. *Threadgill v. Jennings.*

3. *Vanhook v. Barnett.*

4. *Butler and Baker's case.*

5. *Whelpdale's case.*

of it in court by the attorneys of the plaintiff, is sufficient evidence, *prima facie*, of his acceptance; and that therefore at the time of the plea pleaded, the obligee had received the bond. In 8 Dev. (N. C.) 384, it is held that a delivery of such a bond as this to the clerk is sufficient, unless the obligee refuse it. In 4 Id. 270, the same doctrine is reiterated, and indeed all the cases in our court, necessarily affirm the same thing. For, although the point was not made directly, yet it was necessarily involved, as in no case was there proof of an actual consent to receive the bond by the obligee.

But counsel insist, that in all those cases the bonds were delivered according to the directions of the statute. A compliance with the forms of the statute, upon this point, can make no difference, as they were not statutory bonds; the circumstances attending their execution were only evidence of the intention of the obligors in making them, and we have seen that the intention of the obligors in this case, is as clearly shown as though all the forms of the statute had been complied with. So that the evidence of reception by the obligee is as strong in this case as in any one of the cases heretofore decided upon this subject.

Let the judgment be affirmed.

BOND NOT GOOD AS STATUTORY BOND, GOOD AS COMMON LAW BOND: *Claasen v. Shaw*, 30 Am. Dec. 338. As to the effect of departures from the form prescribed by statute, in the case of statutory bonds, see *Smith v. Allen*, 21 Id. 33; *Kincannon v. Carroll*, 30 Id. 391; and *Polk v. Plummer*, *post*.

DELIVERY OF DEED: See references in note to *Van Amringe v. Morton*, 34 Am. Dec. 520; and to *Blackwell v. Lane*, 32 Id. 675.

POLK v. PLUMMER.

[2 HUMPHREYS, 600.]

WHERE A STATUTE DIRECTS BONDS FOR THE PUBLIC BENEFIT to be made payable to the governor or other functionary having legal succession, the office is the payee, and the successor, whether described *eo nomine* either in the statute or bond, or not, may sue on the bond.

IN STATUTORY BONDS, SUPERADDED CONDITIONS not imposed by the statute may be rejected as illegal, and the conditions required by the statute enforced.

DEBT. The opinion states the case. The complaint was adjudged ill on demurrer, whence the plaintiff appealed.

Ewing and Thomas, and West H. Humphreys, attorney-general, for the plaintiff.

Nicholson, contra.

By Court, REESE, J. This is an action of debt upon a bond. E. W. Dale was appointed cashier of the branch of the State Bank at Columbia. The act establishing the bank, 1837, c. 107, sec. 9, art. 9, provides that "every president and cashier, before he enters on the execution of his duty, shall give bond with two or more securities to the satisfaction of the directors, payable to the governor of the state, in a sum not less than one hundred thousand dollars, conditioned for the faithful performance of his duty." E. W. Dale and his securities gave bond in the penalty of one hundred thousand dollars, payable to Newton Cannon, governor of the state of Tennessee, and his successors in office, "conditioned that Dale should well and truly, and with diligence, integrity, and fidelity discharge and perform all and singular the duties appertaining to the said office, and should be responsible to and indemnify the bank of Tennessee, for all sums of money that might become due, and all losses or damages that might be sustained by reason of any default, neglect, fraud, failure, or delinquency of the said Dale (which it was thereby covenanted that he should do and perform), then the obligation to be void," etc. After this, in the above bond, is found the following: "And it is understood and agreed that one recovery shall not satisfy or discharge this obligation, but that it shall be good and available against us, notwithstanding any previous recovery or recoveries, so long as any cause of action exists against the said E. W. Dale, cashier as aforesaid, and that no occasional or temporary absence of said cashier from the said branch of said bank, shall be averred or alleged as impairing the force of this obligation, or of said conditions, but that the same, notwithstanding any such absence, shall continue in full force and virtue." Suit upon this bond was brought in the name of James K. Polk, governor of the state of Tennessee. A demurrer was filed to the declaration, which the circuit court upon argument saw proper to sustain, and the plaintiff in error has appealed to this court.

Two questions have been discussed before us: 1. As the statute directs that the bond shall be made payable to the "governor of the state," and as the bond in the record was made payable to "Newton Cannon, governor of the state of Tennessee, and his successors in office," whether James K. Polk, although governor of the state, and successor of Newton Cannon in office, can maintain the action? For the plaintiff it is said that the action may well be brought either in the name of "the governor of the state" without more, or in the name of

the governor at the time, or if not in office, in the name of his successor, stating himself as governor; that the bond and the action in this case are according to the legal effect of the statute, and sufficiently pursue it; but even if this were not so, that the words "Newton Cannon," "successors in office," and "James K. Polk," may all be rejected as surplusage, and then the bond and the action are in the name of the "governor of the state;" that when a statute directs bonds for the public benefit, to be made payable to the governor or other functionary, having legal succession, the office is the payee, and the successor, whether described, *eo nomine*, either in the statute or bond, or not, may yet maintain the action, such officer being made by form of the statute, and for the public benefit, *quoad hoc*, a corporation sole. Upon this branch of the case, the counsel for the plaintiff have referred to various authorities; among others, to 1 Hay. 144;¹ 4 Bac. Abr. 411; 4 Rep. 65;² 4 Inst. 249; Stra. 452; 4 Dev. 656.³

The counsel for the defendants in this court, do not controvert the point which these authorities were cited to maintain. And we think on this branch of the case no obstacle exists in the way of the plaintiff maintaining this action.

2. In the second place it is contended, that this bond is statutory, made payable to a public functionary, having no right, or power, or interest, apart from the statute, to take any bond at all touching the duties and functions of a cashier of a bank, and that, therefore, no other, or different bond can be taken by him, than that which the statute designates; and that if other and different stipulations than those pointed out by the statute be inserted in such a bond, it is thereby rendered void, not as regards such other and different stipulations merely, but so much also of the bond, as may be conformable to the statute; that in the bond before us, the superadded conditions, or stipulations on the subject of one recovery not satisfying or discharging the obligation, and on the subject of the temporary or occasional absence of the cashier, are of this character, and make the whole bond bad and void as a statutory bond.

On the other side it is said, that these superadded stipulations may be void, and if void, they do not invalidate the balance of the bond, that they stand distinctly apart from the other stipulations, are readily separable from them, and that in fact, without these stipulations the bond is entire, complete, and in exact conformity with the statute. This question has profited by the am-

1. *Anonymous*.2. *Fulwood's case*.3. *Dowd v. Davis*, 4 Dev. 61.

ple research, and clear and vigorous discussion of Mr. Justice Story, in the case of the *United States v. Bradley*.¹ That case indeed has exhausted the subject. The court there remarked: "That bonds and other deeds may, in many cases, be good in part, and void for the residue, when the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period;" and Mr. Justice Story goes on to show that the case was the same, when the illegality arises under a statute, except in some cases, such as those under the statute of 33 Henry VI., c. 9, as to sheriffs taking bonds, which are in terms by the statute declared void, unless taken as set forth therein. And having reviewed several cases in England and the United States, he concludes with this general declaration, that "there is no solid distinction, in cases of this sort, between bonds and other deeds, containing conditions, covenants, or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants, or grants, illegal by the express prohibitions of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants, or grants, which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibition to the illegal conditions, covenants, or grants, but has expressly or by necessary implication, avoided the whole instrument to all intents and purposes."

In the same case, Judge Story remarks, that "a bond may by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intendment of the act, that the bond should be entirely void. Nothing, we think, but very strong and express language should induce a court of justice to adopt such an interpretation. When the act speaks out, it would be our duty to follow it. When it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense." It is true, indeed, that in the case of the *United States v. Bradley*, as well as in other cases, the court held, that the United States being a body politic, had a general power to hold voluntary bonds in the absence of statutory enactments. But the reasoning of the case does not pro-

ceed upon that distinction, and the discussion is not based upon that principle. The result, it would seem, would have been the same, if the bond in question had, by the statute, been made payable to the secretary of war, of the treasury, or other person. The general principle embraces both cases. Whether the bond, by the statute, be payable to the United States, or to some public functionary for their benefit, the conditions not imposed by the statute are void, and the balance good. And the court refers, as an authority to sustain their judgment in the case of the *United States v. Bradley*, to the case of the *Supervisors of the County of Alleghany v. Van Campen*, 3 Wend. 48, where the payees of the bond had none other than statutory power to take the bond. So also in a late case in England, in the common pleas, it was held by all the judges, that a bond payable by a collector of taxes to commissioners of the revenue, which in part did not pursue the statute, was void as to that part, and good as to the balance. Tindal, C. J., remarked, "that the rule of law is, that if a bond be conditioned for the performance of a thing, *malum in se*, or against a positive law, not only is the condition void, but the bond also, and the question is whether the conditions of this bond are for the performance of a thing *malum in se*, or contrary to the statute under which the bond was taken. If the conditions had been solely to pay to the commissioners, it would have imposed an illegal act, and the bond would have been void. But it becomes unnecessary to consider that, because there is a separate condition under which the obligor is to pay to the receiver general. I can not see why we are to call in aid a distant condition which may be illegal, to vitiate that which is clearly legal. Gaselee, J., said, "there is no provision in the act, that the bond shall be taken in any particular form, and the condition to pay to the commissioners, does not render the whole bond void. In *Newman v. Newman*, 4 Mau. & Sel. 66, Lord Ellenborough, C. J., said, "admitting the condition of the bond to be ill, as to one part of it, it seems it may be well as to the other parts; for you may separate at the common law the bad from the good:" 7 Bing. 423.¹

The question therefore, in general, and also as to bonds merely statutory, seems upon authority well settled, and that superadded and distinct conditions, not imposed by the statute, may be rejected as illegal, and the conditions required by the statute be enforced as valid. In the case before us, it will be observed that the directions of the statute are comprised in very

1. *Collins v. Gwynne*.

general language; the form of the bond is not prescribed. To hold in such a case, that if the draftsman of the bond, in filling up its conditions in detail, should insert some, which might be construed as not falling within the general scope of the statute, the entire bond should be thereby rendered void, would be of most mischievous consequences, injuriously affecting all the fiscal interests of the state, and all the fiduciary relations of society committed to the public ministration. As the super-added conditions in the case before us, may be rejected as void, it is scarcely necessary to inquire into their meaning and legal effect. If the clause, relating to one recovery not discharging the obligation, be understood to refer to actions of covenant within the limits of the penalty, then it only asserts what the law would operate without it. If it is to be understood to mean, that more than one recovery of the penalty may be had, then it is repugnant to law, the rules of which it is not competent for individuals by their contract to set aside, and would for that reason be void. We know not whether the other stipulation about absence, would or would not enlarge the measure of accountability intended by the statute. It is unnecessary here to inquire. The stipulation, if not imposed by the legislative intention, may be rejected.

There is somewhat a numerous class of cases in our own books of reports which have been referred to in the discussion. But these cases were upon other principles. They were not suits according to the course of common law, but summary, and often *ex parte* proceedings upon motion, and in most of them the penalty of the bond differed from that presented by the statute, a difference affecting the whole bond. The principle of these cases, therefore, is not in conflict with the conclusion at which we have arrived in the case before us. Upon the whole we are of opinion, that the judgment of the circuit court must be reversed, the demurrer be overruled, and the cause be remanded to the circuit court for further proceedings.

STATUTORY BONDS NOT PURSUING THE FORM PRESCRIBED BY THE STATUTE:
See *Goodrum v. Carroll*, ante, 564, and the decisions referred to in the note;
and *Mackie v. Cairns*, 15 Am. Dec. 477.

HARWELL v. WORSHAM.

[2 HUMPHREYS, 524.]

AN EXECUTION IS NOT KEPT ALIVE in the sheriff's hands where the latter pays the amount thereof to the creditor, there being no agreement for the purchase of the debt.

IF A SHERIFF HAVE A DEBT AGAINST THE EXECUTION DEFENDANT, who places property in the former's hands to satisfy the executions, the sheriff can not pay his own debt before satisfying the writs.

CERTIORARI and *supersedeas*, to certain writ of execution sought to be enforced which plaintiff alleged had been satisfied. Opinion states the case. Verdict for the plaintiff. Defendant appealed.

Goode, Jones and Leatherman, for the plaintiff in error.

Wright, contra.

By Court, GREEN, J. Worsham having recovered judgment before a justice of the peace against R. D. Parrish, the plaintiff in error became security for the stay of execution. After the expiration of the time allowed for the stay, an execution issued against Parrish and Harwell, and came to the hands of Bridges, the constable, who had in his hands other executions against Parrish. At the same time Parrish was indebted to the constable, Bridges, in the sum of about four hundred dollars, which Bridges had loaned him, and for which he held his notes, upon which he was to pay twenty-five per cent. interest. Things being in this situation, Parrish delivered to the constable, Bridges, a negro boy, slave, to be sold, without giving any instruction as to the application of the proceeds of the sale.

The slave was sold for seven hundred dollars, a sum more than sufficient to have satisfied all the executions against Parrish in the hands of Bridges. The constable, Bridges, paid Worsham, the plaintiff below, the entire amount of his execution, without reservation or condition, and without any contract of any sort with the plaintiff, but he did not credit the execution, or return it satisfied, but held it still in his hands. Parrish has become insolvent, and the execution aforesaid is sought to be enforced against Harwell, the security for the stay, on the ground, that Bridges applied part of the money arising from the sale of the slave, to the extinguishment of his own debt against Parrish, and that the remaining portion of the price of the slave was insufficient to satisfy the executions in his hands.

The court told the jury, that "a constable could advance money to the plaintiff in an execution, and pay off the execution,

and then enforce the collection of the execution in the name of the plaintiff therein, for his own use, benefit, and indemnity," but "that such constable could not be his own officer, but that it was competent to place the execution in the hands of another constable to enforce it for his benefit."

The court further charged the jury, "that if the constable, Bridges, had executions in his hands against Robinson D. Parrish, and also private notes of his own on him, and received the negro boy Jacob from Parrish for sale, without any directions from him as to the application of the money he should get from such sale, then it would be competent for him to apply the money to the payment of his own private and individual claims or notes, to the exclusion of such executions."

1. Can a constable or sheriff, after he has paid off an execution to the plaintiff, hold it up as unsatisfied, and enforce the collection of the money upon that execution for his own benefit? We think most clearly, he can not. When the judgment creditor is paid and satisfied, the object for which the execution was issued, has been attained, and the force of the writ is spent. The process being thus *functus officio*, the power which was conferred upon the officer by it, is gone. If upon a subject so plain, authority were wanting, the cases of *Reed v. Pruyn & Staats*, 7 Johns. 426 [5 Am. Dec. 287], and *Sherman v. Boyce*, 15 Johns. 444, are full upon the point. In the latter case, the debtor and the deputy sheriff executed their joint note to one Barney, from whom the money was borrowed, and the officer paid it to the plaintiff in the execution; the debtor agreeing that the execution should still be held in the hands of the deputy sheriff for his security, and that if Barney should call on him for the money, the sheriff might sell under the execution. When the sheriff paid the money to the plaintiff, he informed him that the execution was not intended to be discharged, and his receipt was taken for the money on a separate piece of paper. The court said, it was not a conditional agreement, nor advance of money by the deputy sheriff to the creditor; "the debt must, therefore, be deemed satisfied as to the judgment creditor; and that fact being established, the law, founded on wise policy, considers the execution as *functus officio*."

So in the case before the court, the debt was satisfied. There was no condition in the payment of the creditor; no contract with him for the purchase of the debt, and advance of money, on his assignment, verbal or written, of the beneficial interest in the judgment and execution against the debtor. Being thus

satisfied, no matter by whom, the execution ceased to have any force, or give the officer any power to act. In the case of *Weller v. Weedale*, Noy, 107, it was decided, that if a sheriff satisfy a debt out of his own money, he can not afterwards detain the goods of the debtor, on the *fi. fa.* for his own indemnity. Nor can the question, whether the debtor requested the officer to satisfy the execution, or it was done of his own accord, without the knowledge of the debtor, make any difference.

The second question is, whether the constable had a right to retain part of the price of the slave, in satisfaction of his own debt due by note, in exclusion of the executions he had in his hands? We do not say that an individual, against whom an officer may have an execution, may not pay a private debt due the officer, by stipulating at the time he gives the money, that it is to be received in discharge of such private debt. But a sheriff or constable is required to use active diligence in the execution of process which may come to his hands. He must, if the defendant have property, levy the execution, or show some reasonable excuse why he did not. And if property be placed in his hands for sale, without directions about its application, he is bound to apply it to the execution, although he may have a private claim against the debtor. So, if money be paid to an officer, who has executions against the party, and also a private debt, it must be applied to the executions in preference to the private debt; because the execution creditors have placed in the officer's hands the means of coercing payment of their claims, and the presumption would be, that the money or property was intended by the debtor for the satisfaction of the claims that were thus pressing him; and because the officer is bound to use active diligence in the execution of process, a diligence exceeding that which a man employs in his own affairs. If a private man, without reward, were to undertake to collect a note for a friend, and he had a claim against the same debtor, and money were paid him without direction, he might apply it to his own or his friend's debt. But even in that case, it would hardly be thought fair, if his own debt were extinguished, and his friend's entirely excluded. But how different is the case before the court. The constable, by reason of these executions, obtained property without directions as to its application, and having sold it, applied the proceeds to the payment of a debt for money borrowed of him at twenty-five per cent. interest, and the execution creditors are wholly excluded. If this were tolerated by the court, it is easy to see that it would invite the constables to adopt a system

of fraud upon execution creditors, and oppression upon debtors, that would tend to subvert the foundations of private right, and of civil liberty. Therefore, upon grounds of public policy, if no other principle were in the way, such a procedure could not be tolerated.

Upon both points here noticed, the court erred, and, therefore, the judgment is reversed.

That a sheriff can not pay the plaintiff in the execution, and then levy the execution out of the property of the defendant, see *Reed v. Pruyn*, 5 Am. Dec. 287.

CAPLINGER v. SULLIVAN.

[2 HUMPHREYS, 548.]

A WIFE'S REVERSIONARY INTEREST IS NOT REDUCED TO THE HUSBAND'S POSSESSION by his purchase of the life-tenant's interest. He can not therefore sell the property so as to cut off his wife, in case she survives him.

DETINUE. The opinion states the case.

Burton, for the plaintiff in error.

Caruthers, contra.

By Court, REESE, J. This is an action of *detinue* for slaves. The property in question was bequeathed by the last will and testament of Boling Felts to his wife, for life, and after her death to Ann Sullivan, the plaintiff in this suit, then the wife of William Sullivan, and the said William was appointed executor of the will. He duly took upon himself that office, and in 1819, purchased of Mary Felts, testator's widow, the property in question, for the sum of one hundred dollars per annum, to be paid to her during her life.

In 1830, Mary Felts acknowledged in writing her reception of a sum in gross, from William Sullivan, in satisfaction of her annuity. Subsequently, in the same year, William Sullivan conveyed the slaves, for a valuable consideration, to Caplinger, the defendant, and put him in possession thereof, he, himself, having been possessed of them from the time of his purchase in 1819. William Sullivan died in 1835. Mary Felts, the owner of the slaves for life, and Ann Sullivan, the wife of William, to whom they were limited in remainder, surviving. Mary Felts died in 1838. These facts, in the circuit court, were found by the jury in a special verdict, and judgment thereon was pronounced by his honor the circuit judge, in favor of Ann Sulli-

van, the plaintiff, and the defendant, Caplinger, has appealed in error to this court. Justice Story, in his Commentaries on Equity, par. 1413, states it as a principle, that "no assignment by the husband, of reversionary choses in action, or other reversionary equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship." The assignment, he adds, "is not, and can not, from the nature of the thing, amount to a reduction into possession of such reversionary interests." The general principle thus laid down, we find to be abundantly sustained by authority, and particularly, by the leading cases on the subject: *Purdew v. Jackson*, 1 Russ. 1, determined by Sir Thomas Plummer, master of the rolls, and the case of *Honner v. Morton*, 3 Id. 65, determined by Lord Chancellor Lyndhurst, the fifteenth of April, 1827.

The point settled in the last case is, that where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and tenant for life outlive the husband, the wife is entitled by right of survivorship to claim the whole of the share of the fund, against such particular assignee for valuable consideration. The Lord Chancellor refers to the principal cases relied on, on either side, and particularly to the case before Sir Thomas Plummer, and concludes, after considering the question in all its bearings, and the authorities and principles on the one side, and on the other, that the judgment of the master of rolls, in *Purdew v. Jackson*, was right, and that the husband dying while the wife's interest continued reversionary, had no power to make an assignment of property of this description, which shall be valid, against the wife surviving.

But it is urged on behalf of the defendant, in this case, that the husband did not die, while the wife's interest in the property continued reversionary; for it is said, that the reversionary character of the interest was terminated by the purchase on the part of the husband, from the tenant for life. But this, we think is not so. For if after this purchase, the husband had died, without assignment, can it be doubted, that the personal representative of the husband, would have been entitled, during the existence of the tenant for life, to the property in question, and after that, that the wife would have been entitled by survivorship?

The wife had no interest in the husband's purchase; he stood

in the place of tenant for life. The tenancy for life still continued, and the reversionary interest, unaffected by such purchase, could not commence in possession, till the life estate terminated. The husband possessed the slaves, but he possessed them as purchaser, not as husband, and his title and possession were of, and commensurate with, the life estate, and that only. Here was no merger of estates. The life estate belonged to the husband solely, and absolutely as purchaser; the reversionary interest or remainder, to husband and wife, in right of the wife, and liable to become his absolutely by survivorship. If the husband, having assigned, had continued to live till the life-time estate had terminated, then, indeed, as a court of chancery views such assignment as an agreement to assign when in his power, and considers that also as done, which ought to have been done, the assignee for a valuable consideration, would, in equity, have been entitled to the property.

We have been referred by defendant's counsel to the case of *Pinkard v. Smith and Wife*, Littell's Sel. Cas. 331, as bearing on this question. The court in that case, seemed to be of opinion, that a vested remainder in a slave, occurring to the wife during coverture, so far vested in the husband, as that he would be entitled to recover the same, without administration on the wife's estate. But they also state it, as their opinion, that it does not so vest, as to defeat the wife of her right by survivorship. The case, whether properly determined or not, can, therefore, be no authority bearing upon the case at the bar.

Upon the whole, we are of opinion, that the circuit court pronounced the proper judgment upon the special verdict, and we, therefore, affirm that judgment.

REDUCING TO POSSESSION A WIFE'S CHOSES IN ACTION: "It is well settled that as to the choses in action of the wife, marriage is only a qualified gift to the husband, upon condition that he gets possession during coverture; for if he die before the wife, without having gained such possession, she, and not his personal representative, will be entitled to them; but it is equally true, and has been so expressly held by this court, that the marital right, though it confers no absolute title to the property while a chose in action, yet attaches to the chose in action—vests an appreciable interest therein—gives the right to make the property of which it is the representative absolutely that of the husband; and this right, vendible and assignable, is the subject of sale or gift to the extent of the husband's interests. When the assignment is without consideration, as in case of a gift, if the husband dies before the chose is reduced into possession, the legal right of the wife of survivorship attaches and defeats the right of the assignee. If the assignment is special for value it is considered in many cases a *quasi* reduction into possession, which defeats the legal right of survivorship, and the assignee is only subject to the wife's

equity to a settlement." The above language, taken from the opinion of the court in *Ware v. Ware*, 28 Gratt. 670-672, gives a very complete summary of the general principles in regard to the reducing to a husband's possession the choses in action of his wife. It is the husband's privilege, recognized wherever the common law prevails, to appropriate to himself his wife's choses in action; having done so, these choses become as absolutely his as does her tangible personalty: *Dold's Trustee v. Geiger's Adm'r*, 2 Gratt. 98; *Yerby v. Lynch*, 3 Id. 460; *Estate of Hinds*, 34 Am. Dec. 545 and note; *Parsons v. Parsons*, 32 Id. 362 and note; *Rodgers v. Pike County Bank*, 69 Mo. 560; *Grebill's Appeal*, 87 Pa. St. 105; *O'Connor v. Harris*, 81 N. C. 279; *McVaugh v. McVaugh*, 10 Phila. 457; *Drury v. Briscoe*, 42 Md. 154; *Chapelle v. Olney*, 1 Saw. 401; *Tritt v. Colwell*, 31 Pa. St. 228; *Needles v. Needles*, 7 Ohio St. 432; *Clapp v. Stoughton*, 10 Pick. 463; *Jacks v. Adair*, 31 Ark. 616; *Wheeler v. Moore*, 13 N. H. 478; *Standeford v. Devo*, 21 Ind. 404; *Harper v. Archer*, 28 Miss. 212; *Probate Court v. Niles*, 32 Vt. 775; *Arnold v. Ruggles*, 1 R. I. 165; *Anderson v. Anderson*, 11 Bush, 327; *Thomas v. Chicago*, 55 Ill. 403; *Plummer v. Jarman*, 44 Md. 632; *Johnson v. Bennett*, 39 Barb. 237; *Wiggins v. Blount*, 33 Ga. 409; *Walker v. Walker*, 25 Mo. 367; *Pettin-gill v. Butterfield*, 45 N. H. 195; *Pike v. Collins*, 33 Me. 38; *Manion v. Titworth*, 18 B. Mon. 582; *Lowery v. Craig*, 30 Miss. 19; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; S. C., 12 Moak, 803; *Widgery v. Tepper*, L. R. 5 Ch. D. 516; S. C., 22 Moak, 261; S. C., L. R. 7 Ch. D. 423; S. C., 23 Moak, 649; 1 Bishop's Married Women, chapters 11 and 12; Schouler's Husband and Wife, sec. 152 *et seq.*

The question is, what act or acts of the husband amount to an appropriation; and in entering upon the attempt to answer, we can not give a more accurate idea of the peculiar condition of the law in this regard than is embraced in the following conclusion of Mr. Schouler, in his very recent examination of the subject: "The result of the foregoing observations is," he says, sec. 159, "that reduction into possession offers many very nice distinctions, involving conflicting rights of considerable magnitude. Courts of equity which have taken this subject under their especial control, seem to lay down variable rules; and it must be confessed that the law of reduction is so built upon exceptions, that one may more readily determine what acts of the husband do not, than what acts do bar the wife's survivorship. Another difficulty in dealing with this subject appears from the circumstance that personal property is rapidly growing, and species of the incorporeal sort are developed quite unknown to the old common law; while on the other hand, the doctrine of the wife's separate estate has expanded so fast as to furnish new elements of consideration for most of the latest reduction cases, threatening to extinguish at no distant day all the old learning on the subject, even before its leading principles could be clearly shaped out in the courts."

As a general rule, in order to effect a reduction into the husband's possession of the wife's choses in action, there must be some act on his part which evinces his intent to acquire the property in exclusion of his wife. Actual possession by the husband is not alone sufficient, unless it appear that he holds in his own right alone: *Hind's Estate*, 34 Am. Dec. 545, and note; S. C., 5 Whart. 138. As is said in that note, "if he intends that the property in the proceeds shall remain in his wife, the law will not cast the ownership upon him perforce: *McDowell v. Potter*, 8 Pa. St. 192; *Goodyear v. Rumbaugh*, 13 Id. 481; *Gochenaur's Estate*, 23 Id. 463; *Smethhurst v. Thurston*, Bright, 129." And so *Timber v. Katz*, 6 Watts & S. 298. If the husband hold as trustee for his wife: *Resor v. Resor*, 9 Ind. 347; *Mayfield v. Clifton*, Stew. (Ala.) 375; *Walden v. Chambers*, 7 Ohio St. 30; *State v. Reigart*, 1

Gill, 1; or jointly with her: *Timber v. Katz*, 6 Watts & S. 290; *Nicholson v. Drury Bldgs. Estate Co.*, L. R. 7 Ch. D. 48; *Chapelle v. Olney*, 1 Saw. 401; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; 12 Moak, 803; or merely as executor of the estate out of which the chose arises: *Walker v. Walker*, 25 Mo. 367; *Mayfield v. Clifton*, 3 Stew. 375; *Paige v. Sessions*, 4 How. (U. S.) 122; *Price v. Sessions*, 3 Id. 624; *Kintzinger's Estate*, 2 Ashm. 455; *Vanderveer v. Alston*, 16 Ala. 494, the wife will not be deprived of her right of survivorship. It seems, however, that, *prima facie*, obtaining possession of the proceeds of his wife's chose in action will amount to a conversion to his own use: *Boose's appeal*, 18 Pa. St. 392; *Johnston v. Johnston*, 1 Grant's Cas. 468; *Harper v. Archer*, 28 Mo. 212.

On the other hand, a design to appropriate the thing to himself, without doing so, will not vest the property in him. To deprive the wife of her rights, it is not enough for the husband to entertain an unexecuted intent, to acquire possession of her incorporeal personalty: *Brown v. Bokee*, 53 Md. 155, and authorities cited. And further, says Judge Strong in *Tritt's Adm'r v. Johell's adm'r*, 31 Pa. St. 233, "that reduction into possession, which made the chose absolutely as well as potentially the husband's, was a reduction into possession, not of the thing, but of the title to it." Nor is a "mere getting ready to reduce the chose in action into possession" sufficient: 1 Bishop's Mar. Women, sec. 118.

PAYMENT TO HUSBAND.—If that which was payable to the wife, be paid to her husband, during her life, he clearly evincing his intent to appropriate the money for his own benefit, it is of course a reduction to his possession: *Thomas v. Chicago*, 55 Ill. 103; *Lowery v. Craig*, 30 Miss. 19; *Plummer v. Jarman*, 44 Md. 632; *Johnson v. Bennett*, 39 Barb. 237; *Bates v. Dandy*, 2 Atk. 208; *Alexander v. Crittenden*, 4 Allen, 342. Nor is it necessary that he should receive exactly that thing which was due her; as if, for example, he takes to himself from an executor a bond for the payment of the wife's distributive share in the estate: *Stewart's Appeal*, 3 Watts & S. 476, 477. Payment to him of the interest due on her bonds, is but a reduction of that installment of interest: *Burr v. Sherwood*, 3 Bradf. 85; *Stanwood v. Stanwood*, 17 Mass. 57. And receipt of partial payment is but a reduction *pro tanto*: *Nash v. Nash*, 2 Madd. 133. Negotiation by him of her negotiable instruments, is a sufficient reduction: Schouler's H. & W., sec. 154. To make an effective appropriation of stock standing in the wife's name, there must be a transfer thereof to his name: *Arnold v. Ruggles*, 1 R. I. 165; *Slaymaker v. Bank*, 10 Pa. St. 373; *Brown v. Bokee*, 53 Md. 155. With respect to legacies, the same general rules apply as in case of other choses, and they may be similarly reduced by judgment, assignment, or receipt: *Alexander v. Crittenden*, 4 Allen, 342; *Howard v. Bryant*, 9 Gray, 239; *Weems v. Weems*, 19 Md. 334; *Bryan v. Spruill*, 4 Jones' Eq. 27; *Walker v. Walker*, 25 Mo. 367; *Lewis v. Price*, 3 Rich. Eq. 172; *Probate Court v. Niles*, 32 Vt. 775.

It is not necessary that the husband himself should perform the act requisite to a reduction of the chose; an agent may as satisfactorily represent him: *Alexander v. Crittenden*, 4 Allen, 342; *Turton v. Turton*, 6 Md. 375. Here again the intent is to be considered as is illustrated in *Chapelle v. Olney*, 1 Saw. 401. There it was shown that if the agency is created jointly by the husband and wife, if they give a power of attorney to collect the legacy, the possession of the agent is not the exclusive possession of the husband.

ASSIGNMENT AND RELEASE BY THE HUSBAND.—The question of reducing choses in action by assignment is pronounced by Mr. Schouler a "very perplexing branch of the present subject." Upon some propositions, however,

there appears to be a unanimity among the decisions. It is conceded that a mere voluntary transfer of the chose in action by the husband, without consideration, does not bar the wife's survivorship: 2 Kent's Com., sec. 137; Schouler's H. & W., sec. 157. The dispute is upon the effect of the assignment for value; and here there is an irreconcilable conflict. Some of the authorities maintain that such an assignment will defeat the wife's right of survivorship, though the chose in action is not otherwise reduced to possession: *Siter's case*, 4 Rawle, 468, where this view is supported by the forcible opinion of Chief Justice Gibson; *Tritt v. Colwell*, 31 Pa. St. 228; *Needles v. Needles*, 7 Ohio St. 432; *Tuttle v. Fowler*, 22 Conn. 58; *Hill v. Townsend*, 24 Tex. 575; *Manion v. Titsworth*, 18 B. Mon. 582; *Smith v. Atwood*, 14 Ga. 402. Whereas other courts contend that there must be some further act by the assignee, otherwise the wife's right will not be impaired: *State v. Robertson*, 5 Harr. 201; *George v. Goldsby*, 23 Ala. 326; *Bryan v. Spruill*, 4 Jones' Eq. 27; *O'Connor v. Harris*, 81 N. C. 279. These conclusions follow from the variant views entertained by the respective courts of the nature of the act of assignment. Those contending for the latter doctrine consider that the assignee stands but in the shoes of the assignor; that he takes nothing but what the assignor could give—that is, a right to reduce the chose to possession. If that right be not exercised, the surviving wife has as much claim to recover against the assignee, as she would have had against the representatives of her husband. But Chief Justice Gibson does not accept this view of the assignment; he maintains that that act passes the title to the chose, the husband acting merely as the instrument of the wife; that the assignee does not stand in the same position as the assignor, any more than a vendee of land stands in the shoes of the agent whom the owner has empowered to make the conveyance. It is clearly seen that these two opinions are so diverse as to be irreconcilable.

With respect to future interests, a distinction is taken: "Though a husband may defeat his wife's right of survivorship by an assignment of a chose in action capable of immediate reduction to possession, he can not by an assignment of a reversionary interest:" 1 Bishop's Mar. Women, sec. 154. Such was the principal case, and such is the English doctrine: *Purdew v. Jackson*, 1 Russ. 1; *Tidd v. Lister*, 3 De G. M. & G. 857; Schouler's H. & W., sec. 157.

A pledge is insufficient to bar the wife's right: *Tritt v. Colwell*, 31 Pa. St. 233. And see Schouler, sec. 155, and 1 Bishop, sec. 153.

With respect to a release, it is settled that if the husband release a debt due his wife, for value, it does not survive to her: *Rogers v. Acaster*, 11 E. L. & Eq. 300; *Needles v. Needles*, 7 Ohio St. 432; *Manion v. Titsworth*, 18 B. Mon. 582; *Weems v. Weems*, 19 Md. 334. And this principle is applicable to her rights in action, in general: 1 Bishop's Mar. Women, sec. 131.

REDUCING BY SUIT, AND ARBITRATION.—Where the husband sues in his own name for the recovery of choses in right of his wife, the rendition of judgment in his favor merges the chose, and makes the reduction to possession complete. But when the wife is joined as co-plaintiff, the husband must appropriate to himself the proceeds of the judgment, otherwise the right of survivorship will still exist: *McDowl v. Charles*, 6 Johns. Ch. 132; *Searing v. Searing*, 9 Paige, 283; *Crittenden v. Alexander*, 15 Gray, 432; *Perry v. Wheelock*, 49 Vt. 63; *Pike v. Collins*, 33 Me. 38; 2 Kent's Com., sec. 137. It is not sufficient that the action should have been commenced; the cause must have been carried to judgment in the wife's life-time: *Pettingill v. Butterfield*, 45 N. H. 195, and cases *supra*.

A submission to arbitration accompanied by an award in favor of the husband reduces the chose to his possession in those states where an award has the effect of merging the matter submitted. The award itself is not a judgment at law or in equity, and is, with respect to the subject now considered, merely a declaration that the husband has in right of his wife, the privilege of demanding the payment of certain choses. If he does not avail himself of this privilege, her right ought to survive. And such is the view adopted by Bright: 1 H. & W. 70, 71.

THE INTEREST OF HUSBAND'S CREDITORS in the wife's choses in action is a question of great interest; and the conclusion in regard to the present state of the law upon this point is thus stated by Drake on Attachments, sec. 247, "An interesting question connected with this topic is, whether a husband has an attachable interest in his wife's choses in action, before he has reduced them to possession. Upon this subject courts of high authority have taken entirely opposite grounds, and the question can not be considered as yet settled either way, by weight of authority. In the affirmative it is held, that the wife's choses in action are, in virtue of the marriage, vested absolutely in the husband; that he has in law the sole right, during the coverture, to reduce them to possession, to sue for them, to sell them, to release them; and that he has, therefore, an interest in them which he may assign to another, and therefore an interest which may be reached by attachment, and subjected to the payment of his debts. Such are the views expressed in Massachusetts, Maryland, Delaware, Virginia, and Missouri: *Shuttlesworth v. Noyes*, 8 Mass. 229; *Commonwealth v. Manley*, 12 Pick. 173; *Holbrook v. Waters*, 19 Id. 354; *Wheeler v. Bowen*, 20 Id. 563; *Strong v. Smith*, 1 Metc. 476; *State v. Krebs*, 6 Har. & J. (Md.) 31; *Peacock v. Pembroke*, 4 Md. 280; *Johnson v. Fleetwood*, 1 Harr. (Del.) 442; *Babb v. Elliott*, 4 Id. 466; *Vance v. McLaughlin*, 8 Gratt. 289; *Hockaday v. Sallee*, 26 Mo. 219. It is, however, admitted that if the husband die pending an attachment of his interest, and before the same is finally subjected to his debt, the attachment will fail, because of the wife's right of survivorship: *Strong v. Smith*, 1 Metc. 476; *Vance v. McLaughlin*, 8 Gratt. 289; *Hockaday v. Sallee*, 26 Mo. 219. On the other hand, it is considered—in the language of the supreme court of Pennsylvania—"that though marriage is in effect a gift of the wife's personal estate in possession, it is but a conditional gift of her chattels in action; such as debts, contingent interests, or money owing her on account of intestacy. Perhaps the husband has in strictness but a right to make them his own by virtue of the wife's power over them, lodged by the marriage in his person. But if these be not taken into his possession, or otherwise disposed of by him, they remain; and if he destines them so to remain, who shall object? Not his creditors; for they have no right to call on him to obtain the ownership of the wife's property for their benefit; and until he does obtain it there is nothing in him but a naked power, which is not the subject of attachment:" *Dennison v. Nigh*, 2 Watts, 90; *Robinson v. Woelpper*, 1 Whart. 179. These are substantially the views also of the courts of New Hampshire, Vermont, North Carolina, and South Carolina: *Marston v. Carter*, 12 N. H. 159; *Wheeler v. Moore*, 13 Id. 478; *Pickering v. Wendell*, 20 Id. 222; *Parks v. Cushman*, 9 Vt. 320; *Short v. Moore*, 10 Id. 446; *Probate Court v. Niles*, 32 Id. 775; *Arrington v. Screws*, 9 Id. 42; *Pressley v. McDonald*, 1 Rich. 27; *Godbold v. Bass*, 12 Id. 202. When such a difference of opinion exists between courts of such acknowledged ability as those which have passed upon this question, the subject must needs be remitted to the future, for a nearer approximation to agreement."

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BISHOP *v.* DAY.

[18 VERMONT, 81.]

A SURETY MAY IN EQUITY COMPEL the principal to pay the debt after it has become due. Persons who agree to save harmless the maker of a promissory note are principals with respect to the maker and within the application of the above rule.

APPEAL from the court of chancery. The case appears from the opinion.

C. Adams, for the orator.

L. B. Peck, *contra*.

By Court, BENNETT, J. There is one view of this case in which we are all agreed, that the bill of the orator presents an equitable right which we can recognize. After the notes were executed by Bishop to Spooner, by some subsequent arrangement between Bishop on the one part and Day, Cottrill & Barker, on the other, the latter gave their bond to Bishop, conditioned to pay the notes to Spooner and save Bishop harmless therefrom; and this bond is fully set out in the bill. By this arrangement Day, Cottrill & Barker made these notes their debt to pay, and, as between these parties, they stood as principals, and Bishop in the nature of surety; and the doctrine applicable to principal and surety well applies. At law, the surety must pay the debt before he can have an action against his principal. But not so in equity. After the debt has become due, the surety may resort to chancery to compel the principal to exonerate him from all liability by the payment of the debt. This is a reason-

able doctrine and has long been well established: Mitford's Eq. Pl. 148; 1 Stor. Com. on Eq. 322, sec. 327; 2 Id. 35, sec. 730. The case of the *Earl of Ranelagh v. Hayes*, 1 Vern. 189, is much like the present. The earl had been sued for a sum of money which he was bound to pay to the king, and which the defendant, by an agreement between them, ought to have paid; and the lord keeper decreed that the defendant should perform his covenants. This bill, it is true, is informally drawn with this view of the case; but it contains all the facts necessary to create this equitable right in the orator; and though the bill was evidently drawn with a different aspect, yet, under the general prayer of the bill, we can grant such relief as the party entitles himself to, according to his allegations and proofs. Day, Cottrill & Barker have suffered Bishop to be sued on the notes, and they have passed into judgment and execution, and he may well ask a court of chancery to decree that they pay the judgment.

The apparent object of this bill is to procure a perpetual injunction of the judgment; and this is the relief which is specifically prayed for; and the case has been put upon this ground, in argument, but it may, I think, be well questioned whether the bill can be sustained on that ground. As, however, it is clear that the bill discloses an equity in the orator, in the view now taken by this court, there is no occasion for going into any other questions. The decree of the court of chancery must then be reversed, and the cause remanded to that court to be proceeded with accordingly.

SURETY COMPELLING PRINCIPAL IN EQUITY TO PAY THE DEBT: See *King v. Baldwin*, 8 Am. Dec. 415, and note; *Pride v. Boyce*, 33 Id. 78.

SURETY'S RIGHTS AT LAW AGAINST HIS PRINCIPAL: See *Brentnal v. Helms*, 1 Am. Dec. 44; *Ford v. Keith*, 2 Id. 4; *Hayes v. Ward*, 8 Id. 554; *Ward v. Henry*, 13 Id. 119; *Miller v. Howry*, 24 Id. 320; *Conn v. Coburn*, 28 Id. 746; *Fletcher v. Edson*, 30 Id. 470; *Briley v. Sugg*, Id. 172.

OAKS v. WELLER.

[18 VERMONT, 106.]

A GUARANTOR IS ENTITLED TO NOTICE of the acceptance of his guaranty.

ASSUMPSIT. Plea the general issue. The facts are sufficiently set forth in the opinion. Verdict for the plaintiff.

C. Adams, for the defendant.

J. Maeck, contra.

By Court, COLLAMER, J. The courts in this state, following the American decisions on the subject, have holden that a guarantor shall have notice of the acceptance of his guaranty. But they have also holden that this notice need not be a direct, actual, and personal notice, given only by the plaintiff or his agent. Whether notice was had, is a question of fact, to be found by the jury, from the testimony and circumstances in the case. This was so decided in the case of *Lorillard v. Williams*, in this county, and in *Train v. Jones*, 11 Vt. 444, in Windsor county. The reasonableness of this principle is quite obvious, and commends itself to the moral sense. When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes his responsibility for a thing to be done for another, he may not know that it is done, or, even if he does, he will not know whether it was done on his proposition, or on the sole credit of the third person, or on some other security. The responsibilities and duties of a guarantor imply certain correlative rights and privileges, which, without notice of his condition, he can never exercise. If he is to stand as surety, he must have the right to keep watch of his principal and his circumstances; hold or demand proper security, from time to time, and require of his principal reasonable punctuality, and even, in chancery, to secure indemnity by enforcing payment by the principal. These important rights can not be available while he remains ignorant of his proposition of guaranty having been accepted. All these principles apply with equal force to all persons, though not strictly and technically guarantors, who come in aid of another.

It is, however, much insisted, in this case, that it is dangerous to hold such a doctrine; for this, that, to treat the notice as a condition precedent, would enable the surety, after the acceptance and performance, to revoke before notice. But we recognize no such principle. If the law attaches a stipulation or a condition to a contract, it is to be treated the same as if expressed in the contract. And if two or more things are to be done in succession, the law gives a reasonable time for their successive performance. Hence, where the law interposes a notice between the matter to be done by the plaintiff, and the ultimate liability of the defendant, it allows the plaintiff, after entering on his performance, a reasonable time to give the notice; and, for that time, the power of revocation is suspended. Still, all must be performed before a right of action accrues. This is so in all contracts. If a man were to propose to another,

if he would build a house and paint it, he would, on demand, pay him therefor, and the other, in reasonable time, entered upon building the house, it would be then too late to revoke; still, no recovery could be had, unless, in reasonable time, the house was built and painted, and demand made. So, if a man write, "if you will do such a service for another, I will pay you;" that, in legal effect is, "do that for him, and let me know it, in reasonable time, and I will be ultimately liable." If the thing to be done be seasonably entered upon, the offer can not be revoked; but, before action accrues, the whole must be performed; that is, the thing must be done, and the notice must be given, in the time stipulated, and if none be stipulated, then in a reasonable time. Therefore, holding a notice necessary does not permit a revocation after the performance is entered upon.

In this case the defendant came in aid of Taylor, and proposed, if the plaintiff would assume the debt of Taylor, and procure the discharge of his bail (Prentiss), he would execute his note for fifty pounds. The defendant resided in Upper Canada, and the matter to be performed by the plaintiff was in Vermont. The defendant was clearly entitled to notice from the plaintiff, that he had performed, on his part, and relied on the defendant. It could not be expected the defendant was to come and see the creditor to ascertain if the plaintiff performed; nor could he so ascertain, whether it was done on his proposition. Though when the plaintiff had assumed Taylor's debt, the defendant could not have revoked his offer, yet he could not be responsible, unless he, in reasonable time, received notice that he was relied on. This he needed, and this he was entitled to have, for the reasons already stated. But we find that no notice was attempted to be given the defendant, until two years after the transaction, and then very loose and unsatisfactory. This was not sufficient.

But it is hardly necessary to hold, in this case, any more than to say that, by the very terms of this contract, notice was necessary. The defendant's line, alone, is too imperfect to show any contract. Taken with Taylor's letter, they, together, make the contract. Taylor proposes, if the plaintiff will assume his debt, etc., he will, when written to that the business is done, give his and Weller's notes. Weller but adds his assurance of his note. Now, there is no proof that Taylor has ever been written to, nor in any way informed that the plaintiff has assumed his debt; and, clearly, the defendant, as surety for Taylor, can not be holden when Taylor, his principal, is not.

Judgment reversed.

HOYT v. SWIFT.

[13 VERMONT, 129.]

TRUSTEE PROCESS LIES ONLY FOR DEBTS RECOVERABLE BY THE DEFENDANT against the trustee at law. A debt contingent upon the satisfaction of a mortgage not satisfied can not be attached.

TRUSTEE process, in which Swift and Blake were prosecuted as trustees of Ball, to whom at Blake's request Swift had executed a promissory note conditioned upon the discharge of certain incumbrances on lands conveyed. The county court held that Swift was liable; he thereupon excepted.

A. O. Aldis, for Swift.

S. S. and G. W. Brown, contra.

By Court, COLLAMER, J. Our trustee process is but the attachment of debts; choses in action, instead of choses in possession, or in common with them. They must be such debts as the defendant can enforce in his own name. I speak not now of an action by a creditor, claiming from a fraudulent purchaser, provided for by a recent statute. When the trustee is pursued for a debt, he must be an actual debtor by a debt now due, or *solvendum in futuro*. This was fully decided in *Sargent v. Leland*, 2 Vt. 280; *Hutchins v. Hawley et al.*, 9 Id. 295; and in *Hitchcock v. Edgerton*, 8 Id. 202. The debt, too, for which the trustee is pursued, must be a debt which the defendant could himself pursue at law. It is impracticable thus to enforce a mere equity claim. The want of chancery power, in the county court, to call all the parties incidentally interested before them, and to pursue such a course as to determine their respective and conflicting rights, renders it impracticable. Otherwise two or more copartners might be called in as trustees of another partner, and compelled to render an account of the whole copartnership, and strike the balance between themselves and their copartner, and thus wind up a long and intricate concern without the intervention of an auditor or commissioner, and in the absence of their copartner; and all this, too, when the principal debtor could have sustained no action at law. In this case Swift executed his note, at Ball's request, to Blake, and which Blake holds for his liabilities for Ball; and all this in good faith. It is not a case of a note taken to Blake for Ball, as a naked trustee, without interest, nor done to avoid the debts of Ball. Ball could sustain no action at law, against Swift; neither can he

sustain any action against Blake, for Blake has received nothing, not even enough to pay his liabilities.

A condition was annexed to the note of Swift, that he was not to pay until the mortgage on the land was removed therefrom. That mortgage was to Allen, to secure him against the claims of the heirs of John Ball, deceased, and of Hannah Ball. It may be possible that the receipts of these heirs and their guardians would be a sufficient security that they never will or can claim anything. But Swift had the right to annex what condition he pleased to his contract. He did annex the condition that he was not to pay until the incumbrance was removed from the land. The clear meaning of that is, that it should be removed in the manner known to the law, that is, by deed from Allen, the mortgagee, or by his discharge on the record, according to the statute. Swift is not to be compelled to pay and then take on himself the risk of future controversy with those heirs and with the mortgagee, who will not be bound by any adjudication which can be made in this proceeding, to which they are not parties. The impropriety of attempting to sustain, at law, a proceeding involving the respective and conflicting obligations, rights, and duties of so many persons, not parties to the record, is quite too obvious to require further remark.

Judgment reversed, and judgment that Swift and Blake are not trustees.

CARPENTER v. BRANCH.

[13 VERMONT, 161.]

LIABILITY OF BAILEE.—One who at the owner's request takes a drive in a sulky, is liable for injury to it occasioned by his want of common prudence.

ASSUMPSIT. Plaintiff and defendant were negotiating for an exchange of horses; the former, whose horse was attached to his sulky, told defendant to drive him a little; defendant got in, drove down the street, and in turning without checking the speed of the horse, broke the sulky. The court charged, that if the jury believed defendant did not use common prudence, and was careless and negligent, and thereby broke the sulky, he was liable. Verdict for plaintiff. Defendant excepted.

H. R. and J. J. Beardsley, for the plaintiff.

By Court, ROYCE, J. The only question of importance is, to which species of bailment the present case properly belongs.

If it is ranked with those where the expected profit or advantage of the bailment is limited to the bailor, the defendant should be answerable only for gross neglect; if with those which are exclusively beneficial to the bailee, he would be holden to the exercise of extraordinary care; and if with those which are mutually beneficial to both parties, then he would be bound to the use of common or ordinary care, and would, consequently, be liable for ordinary neglect.

The case states, that at the time of the injury complained of, the parties had already agreed upon the exchange of horses; and, for anything appearing in the case, that agreement was sufficient to pass the property before delivery. It may, therefore, be assumed that the defendant was driving his own horse in the plaintiff's sulky. The inquiry then arises, for whose use or benefit was he thus employed? And the answer must be, that the case discloses no inducement or motive, on either side, beyond the mutual gratification and pleasure of the parties. Nor could the plaintiff's request, as detailed with the other circumstances, have the effect to control or vary the consequences resulting from this view of the subject. The act requested had no tendency to promote his interest, nor had it any connection with his business; and as a means of recreation and amusement, would seem to have been as fully and readily approved by one party as the other. Regarding the transaction in this light, we think the measure of care and prudence, required of the defendant, was correctly given in charge to the jury. If there was no just ground for holding him to a degree of circumspection above the common standard, none is discovered for fixing his responsibility at any point below it.

Judgment of county court affirmed.

BAILEE, FOR USE, is liable for more than ordinary care: *Green v. Hollingsworth*, 30 Am. Dec. 680 and note.

HOUSE v. FULLER.

[13 VERMONT, 165.]

A DISSEISOR PURCHASING FROM A CO-TENANT can not be ousted by a co-tenant until he commits some disseisin of the plaintiff.

EJECTMENT. Plea, not guilty. The opinion states the case. Verdict for defendant. Plaintiff excepted.

Smalley and Adams, for the plaintiff.

Brown and Aldis, contra.

By Court, COLLAMER, J. This land belonged to tenants in common, among whom was the plaintiff and Leffingwell. The defendant took a deed of the lot from Barnum, who had no interest therein, and entered into possession, and thus became a disseisor of the owners. The only effect of the Barnum deed was to give color or character to the defendant's possession; that is, it showed the geographical extent of his claim, and that he held in his own right and not as tenant to the owners; and fifteen years' possession would, by our statute, have given him a title. He was, however, still but a disseisor, and the lot having certain visible boundaries, he, by claiming in his own right and possessing fifteen years, would have acquired the same right, by our statute, without the deed of Barnum as with it. But a disseisor may purchase the legal title to the land he possesses, and thereby acquire all the rights and be subject to all the liabilities of other purchasers. The defendant procured a legal conveyance of Leffingwell's interest in this land; for such was the legal effect of the deed from the administrator. The defendant thereby became a tenant in common with the plaintiff, and so entitled to take or to hold the possession of the land as well as the plaintiff. Entitled to the rights he became subject to the liabilities of a tenant in common. No longer a disseisor, he could make no further claim under his Barnum deed as against his co-tenants, but possessed, as all tenants in common are in law presumed to possess, until the contrary is shown, that is, according to their legal title, *per my et per tout*. From that time the plaintiff could sustain no ejectment against the defendant, his co-tenant, until he was guilty of an ouster or disseisin of the plaintiff, of which no proof was offered.

Judgment affirmed.

PARKS v. MOORE.

[13 VERMONT, 183.]

JUDGMENT IN EJECTMENT IS CONCLUSIVE OF TITLE upon the parties and those claiming under them.

ON PLEA OF FORMER RECOVERY PAROL EVIDENCE is admissible to show, that on the trial in ejectment, the title was not litigated, or to establish the identity of the land.

IN SUCH CASE JURORS on the former trial may testify.

EJECTMENT. Plea, not guilty, and special plea in bar. The case is disclosed in the opinion. Verdict for the defendant by consent.

Smalley and Adams, for the plaintiff.

Harrington, Stevens, and White, for the defendant, upon the conclusiveness of the judgment in ejectment, cited: *Seldon v. Tutop*, 6 T. R. 609; *Bachelder v. Hanson*, 2 Aik. 326; *Dixon v. Sinclair*, 4 Vt. 354; *Gates v. Gorham*, 5 Id. 317; *Dorset v. Manchester*, 3 Id. 370; *Walker v. Ferrin*, 4 Id. 530.

By Court, COLLAMER, J. An adjudication on the merits of a cause, by a court of competent jurisdiction, is conclusive of the matter litigated, upon the parties, and all claiming under them; and, by our statute, a judgment in ejectment is conclusive of title. The identity of the subject-matter of litigation, however, generally rests in parol. It is seldom the case that this can be settled by the record alone, as it may be avoided by a different description. When the declaration is of a general character, as in general *indebitatus assumpsit*, though the judgment is *prima facie* conclusive of all that might have been given in evidence under it, yet resort may be had to evidence to show what, in fact, was litigated, and of that only will the judgment be conclusive. This the plaintiff or defendant may be permitted to do. So, too, the *prima facie* effect of a judgment may be qualified, even in ejectment, by showing, by parol, that the title was not, in fact, litigated; or by showing that the judgment was against the plaintiff; not on the title, but because he did not prove that the defendant was in possession, or because the defendant showed a temporary estate or right in himself, which has since expired. That the identity of the subject-matter of a former action, and the present one, rests, generally, in evidence out of the record, and that parol testimony may be admitted to ascertain it, is quite obvious, and fully settled by the authorities cited by the defendant's counsel in this case. To this point, the jurors, on the former trial, are as admissible as any other witnesses. They were witnesses to show that the land now sued for, and of which the defendant is in possession, is, in fact, the same land, which, perhaps, under a different description, was claimed and litigated in the former suit.

In this case, it appears that John Moore died seised of a farm, in North Hero, extending across the island, from east to west, called the Moore farm, and Elihu Parks owns the farm north of it, being the first division lot of Robert Cochran. A dispute arose in relation to the line between these farms. Parks took possession to the line, twenty-eight or thirty rods south of the line to which Moore claimed. Catharine Moore, as the administratrix of John Moore's estate, commenced her action of

ejectment against Parks, declaring for so much of the Moore farm, and describing it as beginning at the north-east corner of the Moore farm, on the lake shore, and running on the shore southerly thirty rods, and so taking a piece thirty rods wide across the island. In that action, a trial on the merits was had, and the plaintiff recovered against Parks. It must then have been shown that Parks had gotten into possession of so much of the Moore farm, and any testimony tending to show he was not on the Moore farm, or that the north-east corner and north line of the Moore farm was further south than where the administratrix claimed, and did not include the land Parks possessed, would have been admissible. After that recovery, it appears that John A. Moore, the present defendant, under the said Catharine, and, as her tenant, went into possession of said land, and erected a fence on the north line, as claimed by her, whereupon Parks commenced this action of ejectment against him, describing the land as a part of the Cochran lot, which is his farm. Moore pleads the former recovery by the administratrix, and alleges that to be the same land; and this is traversed by Parks. On this issue, all testimony, by parol or otherwise, which tends to show the identity of the land, was admissible, however different might be the descriptions. Moore having given the record of the former action in evidence, and closed his testimony on the subject of identity, Parks proposed, not to contradict this proof, but "to prove that the north-east corner of the Moore farm was, in fact, thirty rods further south." This testimony was very correctly rejected by the court. First, it was an attempt to try again the question which must have been tried in the former action, for it was testimony which would have been admissible on that trial, as it tended to show that the land in controversy was no part of the Moore farm. Secondly, the issue on trial was, whether this land was the subject-matter of the former trial, and the testimony now offered by the plaintiff did not tend to settle that issue, but to impeach the former judgment, and was therefore inadmissible.

It is much insisted that the course taken with this cause would lead to confusion, as a man might recover for number one, and, under that, hold number five. The record of a recovery operates as an estoppel. The parties are not permitted to allege or prove anything which contradicts it. If a man sues for a certain piece of land as number one, and recovers, that settles, as it respects those parties, that the defendant was in possession of a certain piece of land, that the plaintiff owned it, and that it

was lot number one. Now, whenever a question again arises between the same parties, or their privies, in relation to the same land, they are not permitted to contradict either of said points, and, therefore, are not permitted to say it is number five. The only question open to litigation between them, relates to the identity, not to the description. In this case it is obvious there was no contradictory testimony, as to the identity of the land, and the court, therefore, correctly decided that the former recovery was conclusive.

Judgment affirmed.

CONCLUSIVENESS OF A JUDGMENT IN EJECTMENT: See *Hinton v. McNeil*, 24 Am. Dec. 315; *Crockett v. Lashbrook*, 17 Id. 98.

THRALL v. WALLER.

[13 VERMONT, 231.]

DEBT UPON A DECREE IN CHANCERY for the balance of account between partners, will lie.

DEBT. Demurrer to the declaration and joinder. The opinion states the case. The county court overruled the demurrer.

E. F. Hodges, for the defendant.

Plaintiff, pro se.

By Court, REDFIELD, J. This is an action of debt, upon the decree of the court of chancery, for the balance of an account between partners. The only question is, whether the action can be maintained on such a decree. This court entertain no doubt that such actions will well lie. Courts of common law and of equity have concurrent jurisdiction in matters of account. In the case of *Carpenter v. Thornton*, 3 Barn. & Ald. 52, which is much urged upon the court by the counsel for the defendant, Abbott, C. J., puts the very case in judgment as the proper basis of an action for debt. In the case of *Sadler v. Robbins*, 1 Camp. 253, Lord Ellenborough intimates that an action of debt will well lie upon the decree of a court of chancery.

We are fully aware, that, from the long controversy between the courts of equity and common law, in England, the common law courts have inclined wholly to disregard mere equitable rights. Hence in *Preston v. Christmas*, 2 Wilson, 86, a book of respectable authority, and comparatively recent date, it is said: "The whole court were clearly of opinion, that a release of an equity of redemption was nothing at all in the eye of the law."

Any judge, who should now utter such a sentiment, on his own responsibility, would be esteemed a very bold man, if quite sane. Most of the cases relied upon by the defendant may be explained in the same manner. They are decisions and *dicta* resulting from this long controversy.

It is true, too, that, in England, courts of equity are not considered courts of record. But Mr. Justice Story lays it down as clear law, that they are courts of record in America: Eq. Pl. 600, 601. It is certain that a decree of a court of equity, enrolled, is of the same force as a record. It is very obvious, that, until the decree is enrolled, it is of no force. Hence, no action at law will lie upon a mere decretal order: *Hugh v. Higgs and Wife*, 5 Peters. Cond. 560. A decree of a court of equity in the alternative, by way of penalty for non-performance of some specific act required, doubtless would not sustain an action of debt at common law. But when the decree is for a fixed, liquidated, and absolute debt, it would be monstrous to suppose that no action at common law will lie upon it. We allow actions of debt to be sustained, even upon foreign judgments, and could we esteem the judgments or decrees of our own courts of less validity? In the case of *McKim v. Odom*, 3 Fairf. 94, it was held, and, we think, upon good grounds, that debt will lie on a decree of a court of chancery, of a sister state. The reasoning of Mr. Justice Parris, and the authorities relied upon in that case, fully sustain the judgment. When we consider the high character of the judgments of courts of equity, the conclusiveness and absolute deference with which they have been regarded by the courts of common law, for the last fifty years, our surprise is, that any doubt could be entertained upon the subject. And the only grounds upon which these doubts have proceeded, in any recent case, are: 1. That the domestic courts of equity can better carry their own decrees into effect than the courts of common law. But, of this, the parties should judge for themselves. Courts of equity have frequently been known to lend their aid for the mere purpose of enforcing the judgment of a court of common law. There is no good reason why the courtesy should not be reciprocal; 2. It has been said, that the proceedings are not according to the course of the common law, and the original cause of action could not avail the party in a common law court. The same argument will render of no force the judgments and decrees of all foreign courts, almost, except those of Great Britain. The original cause of action is merged and lost. The only inquiry now is, does the decree impose an absolute and

conclusive obligation upon the defendant? Of this no one can doubt. This point was expressly so ruled in *Henley v. Soper*, 8 Barn. & Cress. 16; 15 Eng. C. L. 147. So, also, in the case of *Post v. Neafie*, 3 Cai. 22, and in *Evans v. Tatem*, 9 Serg. & R. 252 [11 Am. Dec. 717]. I make no distinction between decrees of courts of equity in our own state and the other states. If there be any difference, it should be in favor of those of our own state, but there is none.

Judgment affirmed.

BANK OF MANCHESTER v. BARTLETT.

[13 VERMONT, 315.]

POSITIVE AND WILLFUL INTERFERENCE by a creditor, embarrassing the recovery of the claim against the principal, will release the surety.

ASSUMPSIT on a promissory note on which the defendant was surety and Orange Green, principal. Green died before the note matured, and defendant claimed that he had been released by reason of plaintiff's omission to present a claim against Green's estate when requested. Judgment for the plaintiff. Defendant excepted.

D. Roberts, jun., for the defendant.

Sargeant and Miner, contra.

By Court, REDFIELD, J. The present case brings in question a subject upon which there has been, first and last, very much discussion, and upon which the law of different countries has not been uniform. The civil law, founded as it was upon the most enlarged principles of abstract moral equity, extended to sureties some further protection than what has yet been adopted, even in the English chancery. I have not the leisure nor requisite aids at hand, to enable me fully to state all the provisions of the Roman civil law in favor of sureties. They will be found very lucidly discussed, and very intelligibly digested by Chancellor Kent in the case of *Hayes v. Ward and others*, 4 Johns. Ch. 123 [8 Am. Dec. 554]. It is obvious that, by the civil law, the creditor might be required to first exhaust his remedies against the principal debtor, before calling upon the surety. The proceedings against the surety could, by a dilatory plea, be stayed until the suit against the principal debtor, which was carried forward at the expense of the surety, was terminated. The same rule has been adopted in most of the countries of continental Europe, whose jurisprudence is based upon that of the civil law.

But, it is believed, no such general rule has yet obtained in the English chancery. It is certain that, in many cases, under special circumstances, this rule has been there enforced: *Wright v. Nutt*, 1 H. Bl. 136; 3 Bro. 326. In every case where the creditor could not assign the benefit of the fund to the surety, he has been compelled to resort to it himself in the first instance. The same rule was adopted in the case of *Hayes v. Ward*, where the authorities are fully collated.

It is, too, a universal rule of English equity law, that the creditor holds all securities in trust for the ultimate benefit of the surety; that upon the payment of the debt, the surety is entitled to be subrogated to all the rights of the principal, and that if, by any positive and willful act, the creditor release, or render unavailing any of his securities against the principal debtor, to that extent he thereby relieves the surety. It was upon this ground that the case of *McCollum v. Hinckley*, 9 Vt. 143, and the case of *Clark v. Hill*, there referred to, were decided by this court.

But we do not perceive that the present case shows any such positive and willful interference by the plaintiffs in the matter, as will justify the court in saying that, at the time judgment was rendered in the court below, they had released the surety. It does not appear, by the case, at what time the plaintiffs were requested to present this claim before the commissioners on Green's estate, or whether in fact the commission had been closed at the time judgment was rendered against the defendant. If not, and we are not to presume anything against the regularity of the proceedings of the court below, nothing had then occurred in the least tending to embarrass the matter. The surety might then proceed with the claim against the estate of Green, as well as the creditor. It is doubtless true, that the court of chancery would, at the instance of the surety, compel a creditor to take proceedings either against the principal debtor, or his estate, as has been frequently done in the English and New York chancery: *King v. Baldwin*, 2 Johns. Ch. 562 [8 Am. Dec. 415], 3 Meriv. 579, and the cases referred to. But it is not now necessary to consider that point.

Judgment affirmed.

DISCHARGE OF SURETY BY CREDITOR'S INTERFERENCE: *Sneed's Ex'r v. White*, 20 Am. Dec. 175 and note; *United States v. Simpson*, 24 Id. 331; *Grafton Bank v. Woodward*, 20 Id. 566 and note; *Brown v. Wright*, 18 Id. 190; *Everett v. United States*, 30 Id. 584; *Lichtenthaler v. Thompson*, 15 Id. 581; *King v. Baldwin*, 8 Id. 415 and note.

NEWTON v. BOOTH.

[13 VERMONT, 320.]

HE IS INTERESTED AND AN INCOMPETENT WITNESS who has covenanted with the defendant to pay certain notes set off against the plaintiff, nor will the witness' releases to plaintiff and defendant make him competent. NEW TRIAL WILL NOT BE GRANTED ON JURORS' AFFIDAVITS that the verdict was assented to in consequence of errors made during their deliberations and subsequently discovered.

ASSUMPSIT. The opinion states the case. Verdict for plaintiff.

P. Isham, for the plaintiff.

J. S. Robinson and W. S. Southworth, contra.

By Court, BENNETT, J. This case comes before the court on a bill of exceptions, and also on a petition for a new trial.

It seems the defendant pleaded in offset several notes of hand which he had against the plaintiff. In 1834, George Newton and Davenport gave to the defendant their covenant to pay the notes, and, in this situation, George Newton was offered as a witness on the part of the plaintiff, and was excluded by the court below. Is he not interested in the event of the suit, and, therefore, incompetent? If the plaintiff could establish a sum due from the defendant, equal to the sum due on the notes which have been pleaded in offset, the notes would, by this proceeding, be satisfied. If less, then there would be a satisfaction of the notes, *pro tanto*. The witness was directly interested in the establishment of the plaintiff's claim. If established, it in effect went to release him from liability on his covenant. When the notes had been once satisfied, the covenant of the witness to pay them became valueless. It is said that the record, in this case, could not be used in a suit on the covenant against the witness, on the ground that it is *inter alios*. But the record would be admissible to show a judgment rendered, as between the parties to it; and if the defendant was found not to be in arrear, it would show a satisfaction of the notes pleaded in offset, and would be conclusive upon Booth. It is said that the plaintiff in this case had acquired an interest in the testimony of this witness prior to his having executed the covenant in 1834, and that he can not be defeated of that right by the witness' becoming subsequently interested. But it is to be remarked that the plaintiff was a witness to the covenant of George Newton, and, it being a contract in which the plaintiff

iff had an interest, it must be taken that he was privy to the contents of that instrument and consenting to its execution. Here, then, is no wanton act of the witness to deprive the plaintiff of his testimony, and if he became interested in the suit in consequence of having performed some act, by the consent or procurement of the plaintiff, he is still incompetent, and was properly rejected by the county court.

It is apparent that the releases, executed on the trial, could not restore the competency of the witness, and, indeed, they are not relied upon by the plaintiff's counsel. The plaintiff has no legal rights in the covenant to Booth, upon which the release to plaintiff could operate, and, besides, the effect of these proceedings is a direct application of one demand in satisfaction of the other. The release to Booth is inoperative. The covenantor can not well release himself.

The plaintiff claims a new trial for the reasons set forth in the affidavits of several of the jurors. The object of this testimony is to show that the verdict was assented to, by the jurors, who have given their affidavits, in consequence of some errors having occurred during the deliberations of the jury, as they think, upon subsequent reflection.

There has been considerable conflict in the English authorities upon the question, whether the voluntary affidavits of the jurors who tried the cause, can be received to impeach their verdict, on the ground of misbehavior in the panel.

The question, however, has been long settled in the English courts, and, as I think, upon sound principles, against their admissibility. There has been as little uniformity in the opinions of American judges in the different states, upon this point, and it is not uncommon that there has been a conflict of opinion between the different judges of the same state. In the case of *Smith v. Cheetham*, 3 Cai. 56, two of the judges maintained that the affidavits of the jurors should be received to impeach their verdict, while Kent, C. J., was of the contrary opinion. It was subsequently, in the case of *Dana v. Tucker*, 4 Johns. 488, held, that Kent's opinion was the better one, and was adopted in that case by the court. In Connecticut, it had been the practice to admit such affidavits; but in the case of *The State v. Freeman*, 5 Conn. 350, the rule was changed by a unanimous opinion of the court. In this state, at an early day, in the case of *Robbins v. Windover et al.*, 2 Tyler, 11, it was held that the affidavit of one of the jurors who tried the cause, could not be admitted to show misbehavior in one of his fellows. The

court seemed ready to adopt, as a general rule, that the affidavits of jurors respecting the deliberations which led to the verdict, should in no civil action be admitted. In *Harris v. Huntington et al.*, 2 Tyler, 147 [4 Am. Dec. 728], the same question was again before the court; and the court say, "the oftener it is argued, they are the more confirmed in the correctness of former decisions on this point." In *Cheney v. Holgate*, Bray. 171, the same doctrine is adhered to, and I am not aware that a different rule, to any extent, has been acted upon in this state. In the case in 5 Conn., Hosmer, C. J., uses this strong language: "The opinion of almost the whole legal world is adverse to the reception of the testimony in question, and, in his opinion, on invincible foundation." It may indeed seem strange, as is said in the case of *Owen v. Warburton*, 1 N. R. 329, by Sir James Mansfield, C. J., "that almost the only evidence of which the case admits should be shut out;" but he proceeds to say, "considering the arts that might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence."

The reason given for the rule, in some of the cases, is, that such evidence would expose the jury to be proceeded against criminally for such misbehavior. This can not be entitled to much consideration. If this were the reason of the rule, it should not extend to exclude voluntary affidavits, nor to cases where the affidavits simply disclosed misbehavior in some of the other fellow-jurors. The rule, I conceive, is founded upon other and weightier reasons. To admit them would be opening the door to the most dangerous practices, and would be most mischievous in its consequences. The jury would be exposed to have their sympathy wrought upon by a designing and losing party, and subjected to the exercise of the most pernicious arts. Tampering and intrigue would become the order of the day, and an alarming source of litigation would be opened. If we are to penetrate the recesses of the jury-room, through the medium of the jurors themselves, and take cognizance of all that passes in their secret deliberations, it would indeed be difficult to say when a suit had been terminated.

In the case from 5 Conn. a juror was not permitted to testify that one of his fellows disclosed matters to the jury within his own knowledge, not given in evidence on trial. The case in 2 Tyler, 11, and many others, are to the same effect. In the case of *Rex v. Woodfall*, 5 Burr. 2667, it is said that, upon a motion for a new trial, the affidavit of a juror can not be read,

as to what he thought or intended upon the bringing in of the verdict, and in *Rex v. Thirkell*, 3 Id. 1696, the prisoner had been convicted, and before sentence had been passed, eight of the jurors had signed a paper in the prisoner's favor, disapproving of the verdict which they had given. Lord Mansfield is reported to have expressed great dislike of such representations made by the jurors after verdict, saying, that "to listen to them would be of very bad consequence," and Wilmot, J., added, he thought they should be totally disregarded. In *Jackson v. Williamson et al.*, 2 T. R. 281, the court refused to receive the affidavit of the jurors, made after the trial, showing what their intention was in rendering their verdict, on the ground of its introducing a dangerous practice, and one which would be productive of infinite mischief. The affidavits of the jurors, relied upon in this case, as furnishing ground for a new trial, are evidently made upon an afterthought. To admit jurors, after having been exposed to the inquisition of the losing party, and upon after-reflection, which may have led them to doubt as to the correctness of their verdict, or even to dissent from it, to detail the proceedings in the jury-room, and to testify to matters frequently complex, and, perhaps, not accurately comprehended at the time, or imperfectly recollected, and thus make it a ground of impeaching their verdict, would, in my opinion, form a bad precedent, and of dangerous tendency.

It is not, however, necessary for the court to decide the question in regard to the admissibility of these affidavits of the jurors; and whatever my private opinion, as a member of the court, may be, it is possible there may be some disagreement upon this point. As we are all well agreed in the result, that, if the affidavits are received, they furnish no sufficient cause for disturbing the verdict, the decision of the court proceeds upon that ground, and, especially, as in this case, there is some disagreement in the statements of the jurors as to the grounds upon which they proceeded in coming to a result.

The fact testified to by the officer, who attended the jury, can have no effect. The jurors are not judges of the legal effect of their verdict; nor as to its finality. If they misapprehend in either particular, it can not be assigned as cause for a new trial. 1 Swift's Dig. 775. If the misapprehensions of a jury, in regard to a cause being reviewable, were made the ground of a new trial, it would indeed be fruitful of litigation.

The judgment of the county court is affirmed; and the petition for a new trial must be dismissed, with costs.

JURORS CAN NOT IMPEACH THEIR VERDICT: *Cluggage v. Swan*, 5 Am. Dec. 400; *Apthorp v. Backus*, 1 Id. 36 and note; *Harris v. Huntington*, 4 Id. 728; *Little v. Larrabee*, 11 Id. 43, where the verdict was set aside on affidavits; *Forrester v. Guard*, 12 Id. 141 and note; *Crauser v. State*, 24 Id. 457 and note; *Bennett v. Baker*, 34 Id. 655 and note; *Elledge v. Todd*, Id. 616.

BANK OF WHITEHALL v. PETTES.

[13 VERMONT, 395.]

A SHERIFF IS LIABLE FOR NOT LEVYING AN EXECUTION upon which there is a plain clerical mistake in the date of the judgment.

TRESPASS on the case for neglecting to levy a writ of execution. A demurrer to the declaration was sustained. The case appears from the opinion.

D. Roberts, jun., and E. Hutchinson, for the plaintiffs.

T. Hutchinson, contra.

By Court, BENNETT, J. This case comes before the court upon a demurrer to the declaration. The only question presented in argument is, whether the officer was bound to have executed such a process as is set forth in the declaration. If the execution was void, upon its face, the officer could not justify a commitment of the debtor's under it, and ought not to have executed it. The declaration sets forth the judgment as rendered at the June term of the Bennington county court, 1839, and avers, that the execution was issued on the thirteenth of June, 1839, and, by mistake, was dated the thirteenth of June, 1809. The judgment, as recited in the execution, was of the June term, 1839; and it is averred that within thirty days from the rendition of the judgment, the execution was delivered to the officer. No one could have inspected this execution without knowing what the date should have been; and shall this misprision of the clerk render the execution irregular and void? Though the date, alone, might show the execution to be without life, yet, when the officer looked at the whole execution, all reasonable doubt must have been dissipated. In *Laroche v. Wasbrough and Maitland*, 2 T. R. 737, after the defendant had been charged in execution, the same was, upon motion, amended, by reducing the sum in damages, a sum too large having been by mistake inserted. In *McIntire v. Rowan*, 3 Johns. 144, an amendment of a *ca. sa.* was allowed by adding the testatum clause, after the defendant had been committed

to prison. In *Bissell v. Kip*, 5 Johns. 100, it was held that the officer, in an action against him for an escape, could not object that the *ca. sa.* did not follow the judgment, in its sum in damages. The court say, the mistake in the execution was amendable. So in *Cramer v. Van Alstyne*, 9 Johns. 386, a *ca. sa.*, returnable by mistake out of term time, was not void, but amendable. The same principle was applied to a *ca. sa.* tested out of term, in *Jones v. Cook*, 1 Cow. 309.

In *Young v. Hosmer*, 11 Mass. 89, the clerk had, by mistake, inserted a wrong Christian name in the execution, and it was held this could not avail the sheriff in an action against him for taking insufficient bail. The court say: "This was clearly a misprision of the clerk in issuing a judicial writ, and, being so, might be amended." See also, *Lewis v. Avery et al.*, 8 Vt. 289 [30 Am. Dec. 469], and *Avery v. Lewis et al.*, 10 Id. 332. The very commendable industry of the counsel for the plaintiffs has referred us to many other cases, which have more or less bearing upon the question under consideration; but those referred to are deemed amply sufficient to justify the position that the mistake in the date of this execution might, upon motion, have been amended after the defendant had been charged in execution. If the *testatum* clause may be added, by way of amendment, most certainly it may be altered according to truth, upon the well-known axiom that "the lesser is comprehended in the greater."

Upon reason and authority, we think the date of this execution, having been the misprision of the clerk, should be amendable. We have something to amend by. This must be upon the ground that the process is not void; and, at most, but voidable. If the process is absolutely void, it is a mere nullity, and no amendment in such case can be made: *Bunn v. Thomas et al.*, 2 Johns. 190; *Burk v. Barnard*, 4 Id. 309. It is well settled that none but a party or privy to the record can take advantage of an error in process. The sheriff can not, but he is bound to execute erroneous process. It is good until set aside, and this can only be done upon an application of the defendant in the execution: *Jones v. Pope*, 1 Saund. 39; 2 Id. 101; *Bull v. Steward*, 1 Wils. 255; *Bissell v. Kip*, 5 Johns. 100. So if a sheriff make an arrest, on erroneous process, and suffer an escape, he is liable. The result must be that the officer would have been justified in executing the process set up in the declaration, and it was his duty to have so done; and, for his neglect to do it, the sheriff must be responsible. The judgment of this court, then, is, that the plaintiffs' declaration is sufficient, and the

judgment of the county court is reversed, and judgment for the plaintiffs for the amount of their execution and interest.

CLERICAL ERRORS IN WRIT OF EXECUTION: *Hargrave v. Peared*, 12 Am. Dec. 201; *Ross v. Luther*, 15 Id. 341; *Toomey v. Purkey*, 12 Id. 634.

CHASE v. BURNHAM.

[13 VERMONT, 447.]

AN INDORSEE FOR COLLECTION may recover from the maker of a negotiable note, on the common counts.

INDEBTATUS ASSUMPSIT on the common counts for money tried on the general issue. The opinion states the case. Verdict for the plaintiffs. Defendants excepted.

C. Coolidge, for the defendants.

O. P. Chandler, for the plaintiffs.

By Court, BENNETT, J. This case presents the simple question, whether the indorsee of a negotiable note can recover against the maker on the common money counts, in a case where the indorsee is not the owner of the demand, but holds it simply for the purpose of collection, as the agent or trustee of the payee. It is too well settled, to be at this time questioned, that the payee can maintain an action against the maker of the note for moneys had and received. The note furnishes evidence that the maker has received from the payee a sum of money which he promises to repay.

Though it has been sometimes questioned whether the same principle applies to an action by the indorsee against the maker, yet, I conceive there is no sufficient reason why it should not. In *Dinsdale v. Lanchester*, 4 Esp. 201, it was expressly determined that the indorsee might maintain an action for money had and received. In *Tatlock v. Harris*, 3 T. R. 174, the indorsee of a bill of exchange recovered against the acceptor under the money counts. Lord Kenyon uses this language: "We consider it an agreement between all the parties to appropriate so much property, to be carried to the account of the holder of the bill." In *Grant v. Vaughn*, 3 Burr. 1516, it was held that the bearer of a bill of exchange might recover against the drawer upon the general counts. By the statute of Anne, promissory notes, payable to order or bearer, are put on the same ground as inland bills of exchange, and are made in like manner nego-

tiable. By our statute they are also negotiable, and, when negotiated, the indorsee is invested with the right of action. The promise is to pay the money to the payee named in the note, or to such person as he shall appoint. As soon as the note is negotiated, the privity of contract attaches between the new parties, and the maker holds the money to the use of the indorsee.

It is well settled, in many of our sister states, that the action may well be sustained by the indorsee against the maker of a note, and a recovery had on the money counts: *Wilde v. Fisher*, 4 Pick. 421; *Cole v. Cushing*, 8 Id. 48; *Ellsworth v. Brewer*, 11 Id. 316; *Ramsdell v. Soule*, 12 Id. 126; *Eagle Bank v. Smith*, 5 Conn. 71 [13 Am. Dec. 37]; *Pierce v. Crafts*, 12 Johns. 90; *Denn v. Flack et al.*, 3 Gill & J. 369. See also Bayley on Bills, 287, and *Master v. Miller*, 4 T. R. 339. It is true, in the case of *Waynam v. Bend*, 1 Camp. 175, and in *Bentley et al. v. Northhouse*, 2 Ry. & M. 66, a different doctrine is held; but I think the opinion expressed in those cases is opposed to principle, and contradicts the current of decisions on this point. It is said, however, that, let this principle be as it may, as applicable to a case where the indorsee is the holder for a valuable consideration, yet, it ought not to be extended to a case like the one at bar. It is well settled that the indorsee of a note, though only indorsed for the purpose of collection, may maintain an action on the note in his own name. It is not for the maker to inquire into the consideration for the indorsement, and it is no objection that the indorsee sues as the trustee of the payee. The maker has promised to pay to the payee, or to such person as he shall appoint to receive the money. It is difficult to see how this objection can apply with more force to the present case than when the indorsee declares upon the note in a special count. The evidence shows the indorsee to have the legal interest in the note, and though he recovers the money in trust for the payee, still, in legal contemplation, the maker has in his hands money to the use of him who has the legal interest, and it is of no possible consequence to the maker whether the indorsee recovers for his own use, or in trust for the payee. There is, we think, no error in the omission of the county court to instruct the jury as requested, and the judgment of that court is affirmed.

EMERSON v. UDALL.

[13 VERMONT, 477.]

EQUITY WILL NOT ENJOIN A JUDGMENT AT LAW upon any ground which either was tried or might have been tried at law.

EQUITY WILL INTERFERE where a party has failed of an opportunity to present his defense by accident, mistake, or fraud of the opposite party, or where the ground of defense was of an equitable character.

AWARD WILL BE SET ASIDE IN EQUITY for partiality or corruption of the arbitrators, or perhaps where the party knowingly has presented a fictitious claim.

APPEAL from a decree in chancery dismissing orator's bill. The opinion states the case.

T. Hutchinson, for the orator.

C. Marsh, contra.

By Court, REDFIELD, J. The object of the present bill is to enjoin the party from pursuing a judgment at law. This judgment was founded upon an award of arbitrators. A trial was had, at law, upon the merits of the award. The grounds alleged in the bill for setting aside the award and enjoining the judgment, are: 1. That the original claim, allowed by the arbitrators, was wholly groundless; 2. That the arbitrators awarded upon matters not within the scope of the submission; 3. That the orator had no sufficient notice of the time and place of hearing before the arbitrators.

It is no doubt true, that there will be found in the books some little contrariety in the principle of the cases decided, in regard to the points involved in the present case: 1. How far the judgment of a court of law is liable to be overreached in a court of equity; 2. Upon what grounds an award of arbitrators is impeachable, either in law or equity.

Upon the first point, notwithstanding some early cases to the contrary, it is now, I apprehend, well settled, that a court of equity will not examine into the foundation of the judgment of a court of law, upon any ground, which either was tried, or might have been tried, in the court of law. The judgment of a court of law is conclusive upon all the world, as to all matters within its cognizance. If a party fail there by not presenting his defense, when he should have done it, and, but for his own neglect, would have done it, he can have no redress in a court of equity; much less can he expect relief in a court of equity, when he has had a full trial at law upon the very grounds which he now wishes to urge anew. For a court of equity to grant

relief in any such case, would be but to sit as a court of errors, upon the proceedings of the courts of common law, which would be a very invidious, as well as a very unwarrantable assumption.

Equity has sometimes interfered to grant relief, when a party by accident or mistake, without his own default, or by the fraud of the opposite party, has failed of an opportunity to present his defense. So, too, when the ground of defense was exclusively of an equitable character, and such as would not avail the party at law. Beyond this, I know of no good ground upon which a court of equity could interfere to enjoin the party from pursuing a judgment at law. I am aware, however, that there may be found many cases, but not of a very high character for authority, which have gone somewhat beyond this. In the present case there is no pretense, that the party did not have full opportunity to urge his defense in the court of law. The case was there fully tried, upon its merits, before the jury, questions of law reserved, and finally decided in this court.

The question, how far the matters passed upon by the arbitrators were within the submission, and how far the orator received legal and sufficient notice, were fully cognizable in a court of law. That was the proper tribunal, and the only proper tribunal in which to urge any such defense. Those questions were there fully heard and determined against the orator. With that decision he must be content: *Bonner v. Liddell et al.*, 5 Eng. Com. L. 20; *Bean v. Farnham et al.*, 6 Pick. 269; *Matter of Cargey and Aitchison*, 16 Eng. Com. L. 80. But partiality or corruption in the arbitrators, or fraud in the party in obtaining the award, are grounds of defense exclusively of equitable cognizance: *Wills v. Maccarmick*, 2 Wils. 148; *Braddick v. Thompson*, 8 East, 344. In the English practice, I conclude, all arbitrations are made rules of court, and any irregularity in the proceedings is remedied by application to the court to set aside the award. This is more convenient than a resort to chancery, which the party must there do, if he delay until suit brought upon the award: *Swinford v. Burn*, 5 Eng. Com. L. 438. In the present case it is not alleged, in the bill, that the arbitrators were guilty of partiality or corruption. We have then nothing to do with any evidence or inference upon that point. The orator, if he prevail, can only do so upon such grounds as are alleged in his bill.

It only remains to consider how far the orator is entitled to relief, on the ground of fraud in the defendant, in obtaining an unjust award. The kind of fraud which it is necessary to prove upon a party prevailing before arbitrators, in order to justify a

court of equity in setting aside the award, it is not important, perhaps, here to consider, beyond that which is proved in the present case. It is very certain, that the mere fact that the party offered, and prevailed before the arbitrators, upon a groundless claim, is no ground of charging him with fraud. This he might have done with perfect innocence and sincerity. It is necessary something more should be shown. And I feel very confident that the fact, that the party making the claim considered it one of doubtful equity, or even that he might honestly have believed that the claim was not well founded, either in law or equity, if all the facts known to him were fairly laid before the arbitrators, and they allowed the claim, is no such fraud as will justify a court of equity in interfering. The party must, either by suggestion of falsehood, or the suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of the claim which were factitious, and which the party at the time believed to be such. And it is questionable even how far such a case will justify a court of equity in setting aside the award. Some cases of good authority seem to justify such a course. It is certain nothing short of this would justify it.

But, in the present case, there is no approach towards any such state of facts proved. It is even now doubtful how far the claims, for which the defendant obtained an award, were not well founded. It is, perhaps, probable some or all of them were not well founded. This, however, is now attempted to be made out by presumption and inference mainly, which, after such a lapse of time, is, to say the least, wholly unsatisfactory. Upon the question of the justness of the original claims, different members of the court entertain different opinions; but all agree that the case is merely doubtful upon that point. And there is no proof tending to show that the defendant did not present these claims to the arbitrators in perfect good faith, and upon the full state of the facts as he believed them to exist. For a court of chancery to interfere to set aside the award, would be but to try the case upon its original merits, after such a lapse of time, and with appliances and opportunities far less fitted to ascertain the real facts in the case than were at the command of the arbitrators. The decree of the chancellor, dismissing the orator's bill, is affirmed with costs.

EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT on grounds available in the action at law: *Donovan v. Finn*, 14 Am. Dec. 531; *Edwards v. Handley*,

3 Id. 745; *Yancey v. Downer*, 15 Id. 35 and note; *Oliver v. Pray*, 19 Id. 595 and note; *Fowler v. Lee*, 32 Id. 172 and note.

IMPEACHING AN AWARD: See *Alken v. Bolan*, 2 Am. Dec. 660 and note; *Blackledge v. Simpson*, Id. 614; *Ross v. Overton*, Id. 552; *Pleasants v. Ross*, 1 Id. 449; *Hewitt v. State*, 14 Id. 259; *Jocelyn v. Donnel*, Id. 753 and note; *Smith v. Cutler*, 25 Id. 580; *McCalmont v. Whitaker*, 23 Id. 102; *Bumpass v. Webb*, 29 Id. 274; *Elmendorf v. Harris*, 35 Id. 587 and note.

THAYER v. HUTCHINSON.

[13 VERMONT, 504.]

A RECEIPTOR OF ATTACHED PROPERTY MAY BRING TROVER against one who takes it out of his possession having no color of right.

TROVER brought by the receiptor of attached property against defendants claiming to attach the same by virtue of other writs. Plea, not guilty, issue to the country, and verdict for defendants. Plaintiff excepted.

E. Weston and W. Hebard, for the plaintiff.

W. Nutting and L. B. Peck, contra.

By Court, BENNETT, J. The opinion and charge of the county court, in this case, that the plaintiff was not entitled to recover, no doubt proceeded upon the ground that the plaintiff had no such interest in the property in question, as would enable him to maintain trover. It is true that, in Massachusetts, it has been held that the receiptor of chattels attached has but a mere naked possession of them, as the servant of the officer, without any legal interest, and that, therefore, he can not maintain any action against any one who shall take them out of his possession: *Ludden v. Leavitt*, 9 Mass. 104 [6 Am. Dec. 45]; *Warren v. Leland*, Id. 265; *Commonwealth v. Morse*, 14 Id. 217. The same principles has been recognized in other cases in that state. In *Dillenback v. Jerome et al.*, 7 Cow. 294, the supreme court of New York hold the same doctrine, and fully indorse the Massachusetts cases. See also *Barker v. Miller*, 6 Johns. 196, and *People v. Norton*, 8 Cow. 137. The principle of these cases is directly opposed to the present action, and they are the opinions of learned and highly respectable courts, still we can not accede to their soundness. The position that a mere depositary, or bailee for safe keeping, has no special property in the deposit, but a custody only, is certainly a doctrine which is inculcated by the most respectable authorities. In addition to the foregoing, I might refer to *Hartop v. Hoare*, 3 Atk. 44; *Southcote's case*, 4 Co. 84; *Waterman v.*

Robinson, 5 Mass. 304; *Brownell v. Manchester*, 1 Pick. 232. Still, it is often laid down, by elementary writers, that a depositary has a special property in the deposit. Blackstone, in his Commentaries, 2d vol. 452, lays it down that the general bailee may vindicate, in his own right, his possessory interest against any stranger or third person. Sir William Jones, in his Law of Bailments, says: "Every bailee has a temporary, qualified property in the things of which possession is delivered to him, and has therefore a possessory action against a stranger who may damage or purloin them."

A case is cited from the Year Book, 21 Hen. VII., in which Justice Fineax is reported to have said: "In this case the bailee has a property in the thing, against every stranger, for he is chargeable to the bailor, and for this reason he shall recover against a stranger who takes the goods out of his possession." The character of the bailment does not distinctly appear in the report; but, from the statement of the pleadings, it is to be inferred that the bailee was a mere depositary. Other cases are to be found in the books recognizing the same doctrine. But, be this as it may, I do not think it is important, in this case, to determine whether the plaintiff had strictly a special property in the articles in question, or not. He is answerable over to the officer for the property, and the extent of his responsibility may be immaterial; and he ought not to be chargeable without having the means of redress. The plaintiff had the lawful possession of the chattels, and whether this was accompanied with a special interest or property in them, or not, it was sufficient to enable the possessor to maintain trover or trespass against any wrong-doer who violates that possession: *Fisher v. Cobb*, 6 Vt. 624. The finder of a jewel has such a title to it as will enable him to keep the possession against all persons but the rightful owner, and he may maintain trover for it: *Armory v. Delamirie*, 1 Stra. 505. *Sutton v. Buck*, 2 Taunt. 203, 209, is to the same effect. Lawrence, J., in the latter case, says: "There is enough of property in this plaintiff to enable him to maintain trover against a wrong-doer;" and Chambre, J., says; "The plaintiff has possession under the rightful owner, and that is sufficient against a person having no color of right;" and he says: "Even a general bailment, only, for the benefit of the rightful owner will suffice." *Burton v. Hughes*, 2 Bing. 173, and *Creighton v. Seppings*, 1 Barn. & Adol. 241, are to the same effect. But it does not follow that because a depositary or bailee for safe keeping, who has the actual possession of a chattel, can main-

tain trover, as well as trespass, against a wrong-doer, who disturbs his possession, he must therefore have a special property in the chattel. In *Waterman v. Robinson*, 5 Mass. 304, which was replevin, Parsons, C. J., in giving the opinion of the court, expressly states that, as the plaintiff had merely the care of the goods for safe keeping, and no special property in them, he could not maintain replevin, which is founded in property either general or special, but might maintain trespass or trover, if his possession was violated. It is generally said that a sheriff, who has seized goods on an attachment, or execution, can maintain trover for them on the ground that he has a special property in them.

In *Giles v. Grover*, 6 Bli. 277, in the house of lords, this subject is fully examined. Lord Tenterden, in that case, p. 452, says: "These actions," that is, actions by sheriffs, "are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession;" and he adds: "Any man in the possession of goods, as bailee, or otherwise, may, in his own name, maintain an action." Lord Chief Justice Tindal, in the same case, says, in substance: "He who has the legal possession of goods, though not the property, may maintain trover against a wrong-doer, without color of legal title, who can not dispute the title of the party in possession." And he adds: "It would be a better definition of the sheriff's relation to these goods, to say, 'he has them in his custody under a power to sell them, rather than an actual interest or property in them.' They are *in custodia legis*, a phrase which plainly distinguishes a mere custody and guardianship of the goods, from a property in them." Several of the other judges gave the same explanation. Justice Taunton added: "The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which any bailee, who is answerable over, has for his own protection." If this may be termed an interest, or a special property in the chattel, it is like the interest in the receipt-man. Both are founded upon a liability over to others. It is clear there is no beneficial interest. When we speak of a special property in a chattel, we usually mean some right therein distinct and subordinate to the general owner as in the case of a pledge. If, by a special property, we mean a subordinate right to control the chattel, arising out of a lawful possession of it, accompanied with a liability over, then it is clear the mere depositary, or bailee for safe keeping, and the sheriff, who has it *in custodia legis*, have such property. The

defendants, in the case before the court, stand as strangers, and have no color of right.

The fact, that Kidder stated, when the defendants drove away the property, that he took it upon an attachment against Bracket, amounted to nothing. No process was shown; none given in evidence or offered on the trial. The defendants, then, must stand, not only as strangers, but even without any color of right. If then, we were even to hold, as in Massachusetts and New York, that the receipt-man had no property whatever in the chattels, for which this action was brought, but only a mere naked custody, still, his possession and responsibility over to the officer, who delivered them to him, must furnish sufficient title and just right for him to recover, as we think, against these defendants. Without this, the plaintiff may be charged for not returning the chattels to the officer, and yet be left remediless for the very injury, which may put it out of his power to return them. Though it may be true that the officer who served the process might have maintained the action in his own name, still, it does not follow that he alone can have the action. Chancellor Kent, in his Commentaries, vol. 2, p. 585, 3d edition, says, "notwithstanding all the nice criticism to the contrary, every bailee in lawful possession of the subject of the bailment, may justly be considered as having a special or qualified property in it, and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the chattel:" See also 2 Kent's Com. 568; Bac. Abr., Bailment, D; *Roberts v. Wyatt*, 2 Taunt. 268; *Rooth v. Wilson*, 1 Barn. & Ald. 59; *Addison v. Round*, 2 Ad. & El. 799, 804; *Nichols v. Bastard*, 2 Crompt., M. & R. 659-661. In the case of *Burroughs v. Stoddard*, 3 Conn. 160, it was expressly held that the receiptor of goods attached, who had put them into the actual possession of a third person to take the charge of them, might maintain trespass, even against a person who had attached the goods as the property of the same debtor. Such third person was regarded as the mere servant of the receiptor. This same question has received very full consideration by the supreme court of New Hampshire, in the case of *Poole v. Symonds*, 1 N. H. 290 [8 Am. Dec. 71], where it is held that the receiptor may well have the action. The defendant, another deputy sheriff, in that case, too, had attached the property for another creditor as belonging to the same debtor, and was not, of course, without some color of right. The court say that the receiptor acquired a special property in the goods, sub-

ordinate to and consistent with the special property of the officer; and that it is not at all inconsistent that two persons should severally have a special property in the chattel, at one and the same time. We have been led to a more full examination of this question, in consequence of the opposing decisions in Massachusetts and New York, than we should otherwise have thought necessary. We can not, however, subscribe to the correctness of their doctrine; and we think upon well-established principles, the plaintiff had, at least, in the language of Sir William Blackstone, "such possessory interest," in the chattels in question, as was sufficient to entitle him to maintain this action. The judgment of the county court must therefore be reversed, and the case remanded for a new trial.

BAILEE'S RIGHT TO MAINTAIN TROVER: See note to *Hostler's Adm'r v. Skull*, 1 Am. Dec. 585; *McConnell v. Maxwell*, 26 Id. 428; *Poole v. Symonds*, 8 Id. 71, a case parallel with the principal one.

WOODWORTH v. DOWNER.

[13 VERMONT, 522.]

AFTER DISSOLUTION OF FIRM, PARTNER CAN NOT GIVE NOTE in firm name for past indebtedness without some special authority.

ASSUMPSIT. It appeared that the defendant Washburn, after the dissolution of the firm of Downer & Washburn, settled a firm account with Woodworth and gave him the firm note therefor. Plea the general issue. Verdict for defendants.

W. Nutting, for the plaintiff.

E. Weston and L. B. Vilas, contra.

By Court, REDFIELD, J. It is undoubtedly true, that even after a dissolution of a partnership, the acts and admissions of one of the partners, in regard to the partnership liabilities, are, to some extent, binding upon all the partners. Such admissions of one partner are, undoubtedly, evidence to go to the jury in a joint action against all the partners. It is upon this ground, that such admissions have been considered sufficient to take a case out of the operation of the statute of limitations: *Joslyn v. Smith*, 13 Vt. 353.

But it has always been considered, that after the dissolution of the partnership, one of the partners had no implied authority to impose new obligations upon the firm, or to vary the form

or character of those already existing. Hence it was held in the case of *Torrey v. Baxter*, 13 Vt. 452, where one of the partners assumed to give the partnership note for a pre-existing partnership debt, that the note was merely void, and the creditor might sue, and recover, upon his original demand. The same reason, precisely, will forbid that one of the partners should be allowed to state a partnership account, so as to bind the firm, unless some authority be given him for that purpose, as was done in the case of *Averill v. Lyman*, 18 Pick. 346. One of the partners has an implied authority to pay the partnership debts; but not to state accounts on their behalf, or to execute notes. Such is the well-established rule in Westminster hall, and in the American states.

Judgment affirmed.

PARTNER CAN NOT CREATE BINDING OBLIGATION AGAINST THE FIRM AFTER ITS DISSOLUTION: *Lansing v. Gaine*, 3 Am. Dec. 422; *Nott v. Downing*, 26 Id. 491; *Wilson v. Torbert*, 21 Id. 632; *White v. Union Ins. Co.*, 9 Id. 726; *Rootes v. Wellford*, 6 Id. 510 and note. A note made after dissolution by one of the partners in the firm name to payees who have had previous dealings with the partnership and have no actual notice of the dissolution is binding on all the partners: *Graves v. Merry*, 16 Id. 471

CARPENTER v. HOLLISTER

[13 VERMONT, 552.]

DECLARATIONS OF A GRANTOR IN POSSESSION are not admissible to defeat the grantee's title, where such declarations were not of a character explaining or qualifying the possession.

EJECTMENT. Verdict for the plaintiff. The only question was as to the admissibility of a grantor's declaration to defeat the title of the grantee. Verdict for the plaintiff. Defendants excepted.

Bell, Dillingham, jun., Curtis and Peck, for the defendants.

Upham and Wing, contra.

By Court, COLLAMER, J. On the trial, the admissions of Mackres, who is still living and was afterwards a witness in the case, made while he was in possession and before his deed to Hollister, were received to prove the insanity of Taylor, who deeded to Mackres. Was this error? This proceeding is claimed to be sustained on the ground that every concession made by one in possession of land, against his interest, is bind-

ing on him and all who claim under him. In this state, and under our registry system, it is understood that the title to land appears of record, and that every *bona fide* purchaser of such title is safe. But if such purchaser may be defeated by the private concessions of any previous owner, in his chain of title, made while owner, he can not be safe. When such must be the consequence we should be slow to adopt the principle; but if such is the clear result of authority it must be followed.

An examination of the authorities presented by the plaintiff, leads to a view of the whole doctrine of hearsay testimony. As a general rule, hearsay, or the statements of persons not parties of the record, are inadmissible; and when admitted, it is by some exception to the general rule. The rule is a wholesome one, and the exceptions should not be multiplied.

The first exception I would mention is, that it has been permitted to show the concessions of men made contrary to their interest at the time. But such admissions have never been received, merely on that ground, when such person was still living and could be a witness in the cause. This point underwent full examination in this court, in the case of *Warner v. McGary*, 4 Vt. 508. The admissions of Mackres were therefore not admissible, merely on the ground that they were made against his interest, for he was still living, and a witness in the cause. This disposes of several of the authorities cited by the plaintiff.

The admissions of persons whose interest is, in law, identical with the party, made contrary to their existing interest, have been received against such party. Such are the admissions of a payee of a note, made while holder, which have been admitted against the indorsee, who took the note overdue. This point was fully considered in *Warner v. McGary*, and such is the case of *Sylvester v. Crapo*, 15 Pick. 92, cited for the plaintiff. Such was not this case.

In matter of fraud, and in relation to a fraudulent conveyance, the acts and concessions of the parties thereto are, from the nature and necessity of the case, admissible. But no injury can be thereby produced to any innocent purchaser, for unless it appear that he purchased with notice of the fraud, he will not be affected thereby. The case of *Norton v. Pettibone*, 7 Conn. 319 [18 Am. Dec. 116], and *Hale v. Smith*, 6 Greenl. 416, cited for the plaintiff, are of this character; but such were not the concessions in this case. Where the words of a person, accompanying his act, give character to the act, they are regarded as part of the "*res gestæ*," and are admissible. Such are the as-

sertions of an agent in the execution of his agency. Such were the declarations of the pauper, giving character to his residence, in the case of *Baring v. Calais*, 2 Fairf. 463.

Nearly allied to this last, is another exception, and under which come most of the plaintiff's authorities. The statements of a person in possession of land, as to the character and extent of that possession, are admissible as against all who claim under that possession. Of the cases cited by the plaintiff, the following come under this head: In *Reed v. Dickey*, 1 Watts, 152, Campbell held land for McCall, and sold to Templeton, who sold to defendant. It was ruled that the admissions of Templeton, while holding the land, that he knew the land was held under McCall, were admissible. *Dorsey v. Dorsey's Heirs*, 3 Har. & J. [6 Am. Dec. 506], was a bill to enforce a trust, and the only concession admitted, was that of a purchaser that he purchased as a trustee. *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267], was, in effect, but admitting a concession of a tenancy under plaintiff's grantor. All the following cases cited by the plaintiff are concessions by the occupiers of land, either of the character or extent or boundaries of their possessions: *Jackson v. Vredenburg*, 1 Johns. 160; *Jackson v. McCall*, 10 Id. 377; *Walker v. Broadstock*, 1 Esp. Cas. 458; *Davies v. Pierce*, 2 T. R. 53, 55; *Betts v. Devanport*, 3 Conn. 286; *Williams v. Ensign*, 4 Id. 456; *Higley v. Bidwell*, 9 Id. 447; *Deming v. Carrington*, 12 Id. 1; *Woolway v. Rowe*, 1 Ad. & El. 114; *Conn et al. v. Penn.*, 1 Pet. C. C. 496; *Beecher v. Parmele*, 9 Vt. 352.

This disposes of all the cases furnished us by the plaintiff, except the following cases: *Waring v. Warren*, only decides that the statements of a possessor can not be given in evidence to sustain his right. *Beers v. Hawley* was in chancery, and the court compelled the assignee of a mortgage to abide by the written agreement of his assignor, that the mortgagee should not claim a certain accidental and unintended priority. The case of *Rice v. Bancroft*, which clearly has no bearing on this question. In examining these cases we have regarded only the true point involved in their decision, overlooking the *obiter dicta*, and what may have been said by way of illustration. Regarded in this way, and which is the only proper way, they do not sustain, nor does any one of them sustain, the broad principle here contended for by the plaintiff, which is, that any concession of a grantor, made against his title, while he was in possession, is admissible against all who claim under him. It is not to be disguised that some individual judges, in deliver-

ing the opinions of the court, have so said. It was so said by Thompson, J., in *Jackson v. Bard*, and by Buchanan, J., in *Dorsey v. Dorsey's Heirs*, and by Daggett, J., in *Norton v. Pettibone*; but in all these cases, such sayings were not necessary to the decisions, and do not seem to be sustained by authority.

It has been holden in this state, that the concession of a grantor that he held as tenant, or of the limits of his possession, may be given in evidence against his grantee, but this has never yet been so holden as to one who held by a deed on record, showing him in possession in his own right, or where the boundaries are certain by his deed. That would permit the deed of record to be contradicted or qualified by parol. Such testimony, for such a purpose, was overruled in *The Proprietors of Claremont v. Carlton*, 2 N. H. 369. In this case, the plaintiff insists that the concessions of a grantor made while in possession, not explaining or qualifying that possession, are admissible to defeat his title, apparently good of record, even against an innocent, *bona fide* purchaser, on good consideration. This we think dangerous and unprecedented.

Judgment reversed.

GRANTOR'S DECLARATION, WHEN ADMISSIBLE AGAINST GRANTEE: *Brashear v. Burton*, 6 Am. Dec. 634; *Barrett v. French*, Id. 241; *Drum v. Simpson*, Id. 490; *Hatch v. Straight*, 8 Id. 152; *Doe ex dem. Maxwell v. Moore*, 30 Id. 686; *McWilliams v. Martin*, 14 Id. 688; *Beecher v. Parmele*, 31 Id. 633 and note.

POTTER v. WASHBURN.

[13 VERMONT, 558.]

IT IS A SUFFICIENT CHANGE OF POSSESSION, that the depositary of the personalty promises to keep the same thereafter for the vendee.

A RECORDED DEED IS NOT OF ITSELF EVIDENCE of the grantor's title.

HEIRSHIP MUST BE PROVED other than by recitals in a deed of recent date, in order to furnish a foundation for title to land.

POSSESSOR OF PROPERTY MAY MAINTAIN TRESPASS against a mere wrongdoer without showing the extent of his right.

REJECTING WITNESS IS NOT GROUND FOR A NEW TRIAL, where, by reason of the abandonment of the claim to which the witness would testify, no damage has resulted to the defendant.

TRESPASS for carrying away a number of cedar posts. Plea not guilty, with notice of special matter, issue to the country. One Huntington sold the posts to plaintiff, they then being in one Pittsley's possession, who agreed to hold them for plaintiff. Defendant claimed by virtue of executions against Huntington,

having been attached subsequently to the sale to plaintiff. Defendant further contended, that the posts were cut on land not belonging to Huntington, but on land the property of the estate of Holbrook, and that the heirs had given a release to defendant. Verdict and judgment for plaintiff.

J. A. Wing and W. Upham, for the defendant.

Curtiss and L. B. Peck, for the plaintiff.

By Court, REDFIELD, J. The apparent importance of this cause to the parties, and the extent of erudition, as well as of minute criticism, which the discussion at the bar has put in requisition, might, perhaps, have justified a more extended opinion. But the very great number of cases which it becomes necessary, under the present law, to report, makes it indispensable to study brevity.

We think the change of possession was sufficient, where property, at the time of the sale, is in the actual custody of some bailee or depositary for the vendor, all that is ever required, in order to perfect the sale, as against creditors, is that the depositary shall be notified of the transfer, and consent to keep the property for the vendee. Cases might, perhaps, occur where less would suffice. In regard to the evidence offered to show that the defendant, since the trespass committed, had obtained a release from the real owner of the property, it is not necessary to decide. The evidence falls short of showing that fact. There is no evidence that the estate of John Holbrook possessed any interest in the land, on which the posts were cut, except what results from a deed recorded without possession, and no evidence of the title of the grantor. This has never been recognized, in this state, as giving to the grantee any interest in the land.

It is very certain when one attempts to derive title to land through the heirs of a former proprietor, the fact of heirship must be proved. This can not be done by a recital, merely, in the deed, especially where the deed is of recent date, which, at most, amounts to a mere claim of heirship.

It is always true, that the possessor of personal property may maintain trespass against a mere wrong-doer, without showing the extent of his right. Possession is, of itself, sufficient title against all the world, except the true owner.

In regard to the interest of the witness, White, it is not necessary to decide. Had his testimony been received, it could at most have only reduced the damages to the extent of his own

interest, and, by releasing those damages, the plaintiff has wholly obviated the exception.

The exception to the form in which the case is drawn up is too refined for practical application. It seems to have resulted from the fact that the counsel drew up the case, by detailing all the testimony; that in the charge to the jury the word "facts" is used instead of "testimony;" but not in such a manner as, by any possibility, to mislead the jury. The jury should have been told if they believed all the testimony detailed; but where there is no conflict in the testimony, the expression, "the facts detailed," seems to be of much the same import. If the jury believed all the "facts detailed," it must be all "facts detailed," in the testimony.

And how they could do this, and not believe the testimony, is past our comprehension. It is no doubt true that critical accuracy would give a preference to the use of the term "testimony," instead of "facts," but so correct a writer as Mr. Starkie, in numerous instances, uses the terms as synonymous and convertible. We should not have deemed this exception deserving so much as a remark, *en passant*, had it not been for the apparent self-delusion which the counsel seem to have brought upon themselves in regard to the matter. For if the "facts detailed" constituted a sufficient change of possession, as the jury were instructed, and as we now decide, it could not surely be necessary to inform the jury, in any other manner, what constituted a sufficient change of possession. We are glad that the counsel have brought this matter to the notice of the court, because it is important that cases should be stated with precision, and with some degree of critical accuracy; and we like that the bar should feel perfect freedom in their remarks and strictures upon cases, drawn up even in the haste of a *nisi prius* term. In the language of one of the most refined and elegant of the historians of the Roman empire, *rara temporum felicitate, ubi sentire, quæ velis, et, quæ sentias, dicere lice*

Judgment affirmed.

SALE—DELIVERY OF THE PROPERTY IN A THIRD PERSON'S POSSESSION: *Pleasants v. Pendleton*, 13 Am. Dec. 726; *Tuxworth v. Moore*, 20 Id. 479; *Barney v. Brown*, 19 Id. 720.

POSSESSION IS SUFFICIENT to maintain trespass against all save the owner: *Wilson v. Bibb*, 25 Am. Dec. 118; and generally as to who has sufficient title or possession to maintain trespass, see the note to *Orser v. Storms*, 18 Id. 543.

BROWN v. TAYLOR.

[13 VERMONT, 631.]

JUDGMENT IN EJECTMENT BROUGHT BY A WARRANTEE is evidence against the personal representatives of the warrantor to whom notice of the pendency of the action had been given, although no further notice is given to the personal representative, the warrantor dying pending the action.

JUDGMENT IN EJECTMENT AGAINST A WARRANTEE is conclusive against the warrantor with notice, and of want of title in him, in an action on the covenant of warranty.

JUDGMENT IN SUCH CASE is evidence of want of title in the warrantor, only to the tract involved in such action.

COVENANT. *Non est factum* and several pleas in bar pleaded. Issue to the country, and verdict for the plaintiffs. The opinion states the case.

S. A. Willard and E. Paddock, for the defendant.

T. P. Redfield, contra.

By Court, WILLIAMS, C. J. The questions arising in this case are: 1. Whether the judgment rendered by the supreme court, at the March term, 1835, in the suit in favor of the present plaintiffs against Ebenezer Kimball, was conclusive evidence against this defendant of a want of title in his intestate to the lot then recovered against the said Kimball, so as to preclude him from showing title to the lands in this suit; and, 2. Whether the rule of damages adopted by the county court, in giving the value of the whole right was correct.

It appears that Kimball was in possession of only part of the right of Experience Fisk, to wit, of lot No. 5, and shortly after the commencement of the suit against Kimball, the plaintiffs cited McDaniel, the defendant's intestate, to appear and show title to the land then sued for. After the judgment rendered in that suit in the county court in favor of Kimball, adverse to the title of the plaintiffs, derived from McDaniel, McDaniel died. Exceptions, it seems, had been taken to the decision of the county court, which had not been heard at the death of McDaniel, and no further notice or citation was given to his administrator. The judgment of the county court was affirmed in March, 1835.

We are of opinion that the plaintiffs, having commenced an action of ejectment against a person in possession of the lands deeded and warranted to them by McDaniel, and having given notice thereof to McDaniel, in his life-time, was not required to do anything further in order eventually to charge McDaniel, or

his legal representatives, with the consequences of a failure to establish a title in them to the lands conveyed. On serving that notice, it became the duty of McDaniel to make proof of his title in that action, and this duty devolved upon his legal representatives, without any further notice from the plaintiffs. Their failure to establish, or make proof of title, was equivalent to an eviction, and, according to the decision of this court, made in the case of *Park v. Bates*, 12 Vt. 381, entitled the plaintiffs to maintain this action. The effect of such a judgment, with notice, is conclusive evidence of the want of title in the grantor, and sufficient to enable the grantee, or his assigns, to maintain an action on the covenant of warranty, unless it can be made to appear that the recovery was had on account of some act or neglect on the part of the grantee or his assigns. The offer, in this case, to show a title in McDaniel, at the time he conveyed to the persons under whom the plaintiffs claim, without showing that such title had been lost through the fault or neglect of the plaintiffs, or the persons conveying to them, was inadmissible and properly rejected by the court, as it would be, in effect, to try the same questions which had once been adjudicated in a suit to which the defendant was, or might have been, a party.

As this judgment was thus conclusive, so as to enable the plaintiffs to maintain this action, it could only be conclusive as to that part of the land, formerly conveyed by McDaniel, which was in controversy in that suit, and there adjudicated. This was lot No. 5, only, as that was the only lot of which Kimball was ever in possession. And, from the exceptions and judgment in the case, it appears it was the only lot in controversy, in that suit. Whether the original declaration in the suit against Kimball declared for the whole right, or the lot of which he was in possession, the judgment was only conclusive as to this particular lot. It would not have availed the plaintiff in that suit to establish a perfect title to any other part of the right of Fisk, unless they could show a title to the lot in controversy. The result, therefore, is, there has been no eviction, or that which is equivalent to an eviction, of any other part of the right in question, except lot No. 5, and this was necessary to enable the plaintiffs to recover on the covenant of warranty. We are not to say whether it is, or will be, of importance to the plaintiff to enter into possession of the other parts of the right, or commence any action to recover therefor. As the defendant was precluded from giving any evidence of the title of his intestate, by the operation of the judgment, rendered in the action against

Kimball, he will not be precluded from showing a title to any other part of the right when he is legally called on so to do. The county court, in rendering judgment on the verdict of the jury, for the value of the whole right, erred, and this judgment is reversed, and judgment is to be rendered for the plaintiffs to recover the value of lot No. 5, only, which the jury estimated at four hundred and fifty-one dollars and twenty-eight cents.

JUDGMENT IN EJECTMENT AS EVIDENCE AGAINST THE WARRANTOR: See *Fitzhugh v. Croghan*, 19 Am. Dec. 139; *Davenport v. Muir*, 20 Id. 143; *Belden v. Seymour*, 21 Id. 661; *King v. Kerr's Adm'r*, 22 Id. 777 and note; *Davis v. Wilbourne*, 23 Id. 154.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

SMITH v. LOYD.

[11 LEIGH, 512.]

WHERE NEITHER DEBTOR NOR CREDITOR MAKES APPLICATION OF PAYMENTS, the law will make the application according to the justice of the particular case, in view of all the attendant circumstances.

RULE GOVERNING APPLICATION OF PAYMENTS BY AN ATTORNEY to a client is not the same as that which governs payments by a debtor to a creditor. **APPLICATION SHOULD BE TO EXTINGUISH DEBTS ACCORDING TO PRIORITY** of time, in cases of long-standing accounts where debts and credits are constantly occurring and no balances are struck otherwise than for the purpose of making rests.

Loyd employed Smith, an attorney, to collect debts owing to the former. Smith remitted money on account of the collections at different times. On the settlement, the parties were unable to agree. Loyd brought suit for an accounting, and the court referred the matter to a commissioner. Some dispute arose before the commissioner on questions of fact, particularly the justice of a charge to Smith of a debt due from one Repass. From the report it appears that the commissioner charged Smith with the original debts he had undertaken to collect with interest, and credited him with the payments upon them at the date when made; applying the payment in discharge first of the interest and then of the principal. He thus ascertained an aggregate balance of principal and an aggregate of interest due, and stated the account as in the ordinary case of debtor and creditor. Smith filed many exceptions to the details of the account and to the manner of making up the entire account. Brown, chancellor, sustained some of the exceptions to the details, overruling the others, and the report was reformed. Smith

filed exceptions to the reformed report, which were heard before Chancellor Tucker and overruled by him. Smith then petitioned for a rehearing on the ground of the wrongful application of his payments. The rehearing was denied, and Smith appealed.

R. C. Stanard, for the appellant.

Nicholas and Robinson, contra.

ALLEN, J. As to the application of payments, where no specific application was made by the parties, and where it does not appear upon what claim the money was received, generally speaking, the debtor has the right to make the application. If he fails to do so, the creditor having different debts, may make the application as he chooses. These are familiar and well-settled rules. But where neither party makes the application, and the question is referred to the court, upon what principle is the adjustment to be made?

According to the civil law, the presumable intention of the debtor was resorted to, as the rule to determine the application: and in the absence of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor? In England, the question would seem to be still unsettled. The leading cases are reviewed by the master of the rolls in *Clayton's case*, 1 Meriv. 605, and he remarked, "that the cases set up two conflicting rules, the presumed intention of the debtor, which in some instances at least, is to govern, and the *ex post facto* election of the creditor, which in other instances is to prevail;" and concluded that he would be much embarrassed were the point necessarily to be decided in that case. The question has arisen in several cases in the supreme court of the United States. In *Field v. Holland*, 6 Cranch, 27, that court said, that "if the application is made by neither party, it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It can not be conceded that this application is to be made in a manner most advantageous to the debtor. If neither party avails himself of his power, and it devolves on the court, it would seem reasonable that an equitable application should be made. And it being equitable that the whole debt should be paid, it can not be inequitable to extinguish first those debts, for which the security is most precarious." And in accordance with those principles, the application was made in a manner most beneficial to the creditor. In *The United States v. Kirkpatrick*, 9 Wheat. 737, the court said: "If both parties

omit, the law will apply the payments according to its own notions of justice." And in that case, they were so applied as to operate beneficially to the sureties of the debtor and against the creditor. The same proposition is laid down by Justice Story in *United States v. Wardwell*, 5 Mason, 82. If neither party makes the application, the law will adjust it, by its own notions of the equity and justice of the particular case. The point has not been decided (so far as I can discover) in Virginia. In the absence of any express authority, I incline to the opinion, that the position taken by the supreme court, is, upon the whole, the best. No general rule applicable to every case could be adopted and adhered to, without producing great hardship. Men keep their accounts loosely: scarcely any case occurs, which does not vary, in some material circumstances, from every other case. Justice to creditor, or debtor, would frequently require exceptions to any specific rule that might be adopted; and these exceptions would multiply with the ever-varying dealings and transactions of individuals, until at length the rule itself, and the particular cases in which it could apply, would become exceptions. If the parties, having the power, fail to use it, they can not complain that the law, not conforming itself to the presumed intentions of either, makes the application according to the justice of the particular case, in view of all the circumstances attending it.

How should the payments have been applied, so as to have done justice to the parties in the case before us? The mode adopted is most favorable to the creditor. A number of claims were added together, interest computed on the principal of each, and the credits applied, first to liquidate this interest. In this instance, the rule adopted must operate injuriously to the debtor. For the debts so added together, appear, in most instances, not to have been collected when charged to the attorney. The debtors when they did make payments to him, would, in most cases, pay a part, and in some, the whole, of the claims. Every such payment would therefore reduce the amount upon which the attorney could collect interest. If when he makes payment to his client, the credit is applied to the aggregate of interest accruing on many claims, the whole of the principal is an interest-bearing fund against him, whilst he receives interest but upon a portion of the principal from the original debtors. By this operation, the client receives more than his attorney could collect. Even if the precise period at which all the claims were collected could be ascertained with absolute certainty, it

seems to me this mode of application should not be adopted, where the relation of attorney and client exists; though as between ordinary debtor and creditor, it may be right to apply the credit first to the interest of the debt. In this case, the attorney was not the original debtor; but the effect of the mode adopted in stating the account, is to substitute him as the debtor of his client in the place of the original debtors, and by a consolidation of the debts to improve the condition of the creditor. It is true, that when he receives it, he holds the money of his client in his hands. But he should not be subjected to the rule which applies between ordinary debtor and creditor, unless a disposition is manifested to appropriate the money of the client to his own use.

The application made by the report conflicts with another rule established by the cases above cited; and that is, that in cases of long-standing accounts, where debits and credits are constantly occurring, and no balances are struck otherwise than for mere purposes of making rests, the payments ought to be applied to extinguish the debts according to priority of time. In this case, no regular account was made out between the parties: but that does not affect the principle. The matter rested in account; there were debits on one side for claims collected, credits on the other for money paid. These claims on either side, must be brought into the account whenever it is adjusted. And this principle, recognized by all the cases, must govern the application of the payments. For that, it is held, is the legal result of carrying the credits into the general account. I think, therefore, that upon the justice of the case, as well as upon authority, the credits, in this instance, should have been applied to the items charged, according to priority of time; and that the exception of the defendant to the mode of stating the account was well taken and should have been sustained.

I am therefore of opinion, that the decree should be reversed. That the defendant's exception to the charge against him for the debt of Raspass, should be sustained. That the cause be remanded, in order that the accounts may be recommitted with instructions to charge the defendant with the claims at the time the same were collected by him, taking the period up to which the defendant, in the account filed with his answer, has calculated interest upon them, as the period of collection, where the contrary is not shown: if the account so filed by him omits any claim which he has collected, and there is no evidence of the time of payment, to charge it to the defendant, within a reason-

able time for collection after it was placed in his hands; and if it does not appear when the money was paid, or the claim placed in his hands, then he should be charged with it within a reasonable time for collection after it became due. That the commissioner ascertain the amount of each claim, including principal and interest, when collected, or when chargeable to the defendant; and after deducting five per cent. for commission, calculate interest upon the whole amount of the claim against the defendant, allowing in each case four months for the defendant to make remittances; and that he apply the payments, where no specific application was made by the parties, and it does not appear upon what claim they were received by the defendant, to the items as they are charged in the account in the order of time in which they stand charged, applying the credits, first to the extinguishment of the interest, and the residue to the principal of such item.

The other judges concurred. Decree reversed, and cause remanded, etc.

TUCKER, P., and STANARD, J., absent.

APPLICATION OF PAYMENTS.—The general rule of law is, that a person indebted to another on different demands, upon making a payment, may apply it to any demand he pleases; and if the debtor fails to do so, the creditor may appropriate the payment as he pleases: *Brady v. Hill*, 13 Am. Dec. 503; *Baker v. Stackpoole*, 18 Id. 508; *Burks v. Albert*, 20 Id. 209; *Vicary v. Moore*, 27 Id. 323; but if the demands are not of equal dignity, one debt bearing interest and the other not, the payment shall be directed to that bearing interest: *Bacon v. Brown*, 4 Id. 640; nor can a creditor apply to items not recoverable: *Sellick v. Munson*, 16 Id. 689; nor retain payment to apply it on future demands: *Baker v. Stackpoole*, 18 Id. 508; when neither party makes application, the law will apply the payment: *Harker v. Conrad*, 14 Id. 691; *Baker v. Stackpoole*, 18 Id. 508; *Burks v. Albert*, 20 Id. 209; *White v. Trumbull*, 29 Id. 687.

CLARKE v. CURTIS.

[¶1 LEIGH, 559.]

OBJECTION THAT PARTY WAS IMPROPERLY JOINED IN BILL for specific execution of a contract of sale, and that the bill ought to be dismissed as to him, is premature where there was not a final decree in the cause.

SPECIFIC EXECUTION OF CONTRACT FOR SALE OF REAL AND PERSONAL PROPERTY for lump sum will be decreed.

WHERE DEED IS NOT TO BE EXECUTED TILL PAYMENT is made in a contract for the sale of real and personal estate, the vendor has a lien on all the property for the purchase price. STANARD, J., dissented as to the lien on the personalty.

VENDOR MAY FOLLOW PERSONALTY INTO HANDS OF THIRD PERSONS to whom vendee has sold it *pendente lite* in such a case.

VENDEE CLAIMING SET-OFF AGAINST PURCHASE PRICE on account of claims held against the vendor, the account should be sent to a commissioner if the evidence justifies it.

APPEAL from the circuit superior court of Gloucester from a decree upon a bill for the specific execution of a contract of sale. C. Curtis contracted to sell the property in question to R. Curtis, Fitzhugh, and Clarke, joint purchasers, and by the memorandum of the agreement the price was to be paid when he gave the parties a "deed of said estate, and a bill of sale of the personal effects." The terms of payment were agreed upon by parol, but by the time the first installment was due, R. Curtis and Fitzhugh tired of the bargain, whereupon Clarke agreed to become the sole purchaser, and C. Curtis agreed to sell the property to him upon substantially the same terms as before, the difference being only that the term of credit was lengthened. In pursuance of this new arrangement, a second agreement was drawn up by Curtis, setting forth the fact of the withdrawal, and stipulating to give Clarke a deed whenever he should make the payments agreed upon. Clarke paid a portion of the first installment before it was due, and continued in possession, the land having been delivered under the first agreement. Clarke refused to pay the first installment when it became due, unless Curtis should execute him a deed, and claimed a set-off on the strength of certain claims he held against Curtis, which Curtis refused to allow. Curtis then exhibited his bill, setting forth these facts, and also that the land was chiefly valuable as timber land, and that it was in danger of being rendered valueless on account of the cutting of the timber by Clarke. The bill prayed an injunction to restrain Clarke, and Fitzhugh, his agent, from cutting more timber or removing that already cut, and also a specific execution of the contract by Clarke, or in lieu thereof a sale of the whole property to pay the debt. The injunction was awarded. Clarke, in his answer, insisted upon his right to a set-off, and denied endangering the premises. Afterwards Curtis, by leave of the court, filed an amended bill, praying an injunction to restrain Clarke and Fitzhugh from disposing of the chattels on the farm. The injunction was awarded. Clarke, in his answer to the amended bill, said he had sold the personal property. It appeared that the sale was subsequent to the filing of Curtis' original bill. Fitzhugh answered that he had no interest in the property in controversy; that he had held the prop-

erty as agent for Clarke until the sale thereof, and that after the sale he held the property as agent for Clarke's vendees. Curtis then filed a supplemental bill, making Clarke's vendees parties, with a view to charging the personal property for the purchase money. The vendees never answered the bill, and it did not appear that any process to bring them before the court was sued out. Evidence was adduced to prove that Clarke had sufficient property besides the farm to pay the purchase money, and that Curtis knew this. There was no distinct proof of the items of set-off except enough to show that some of them might be just. The court, on motion of the plaintiff, ordered that the chattels which had been sold and the wood already cut should be sold by a commissioner, at auction, on a six months' credit, the commissioner to take bonds for the proceeds, and to hold the same subject to the order of the court. When the cause came on for hearing, the court decided that according to the agreement, Curtis retained a lien upon all the property sold, and that the sale by Clarke of the property did not divest the lien, as it was made *pendente lite*. That as Clarke had not shown himself entitled to the claims by way of set-off, a reference to a commissioner was not granted. The court decreed Clarke to pay the balance of the purchase money, and in default thereof, the property to be sold by commissioners on due notice, at public auction, to the highest bidder, the proceeds to be applied in payment of the debt, and the residue, if any, to be paid to Clarke. The defendants appealed.

Daniel, for the appellants.

Robinson, *contra*.

TUCKER, P. Various objections have been made to this decree, of which I shall proceed to dispose as succinctly as may be.

1. On the part of Fitzhugh, it is contended that he was originally improperly made a party, and that the bill as to him ought to have been dismissed. This objection is premature, as there is not yet a final decree in the cause. Until such decree be rendered, the plaintiff may go on with his proofs, and peradventure establish some ground of charge against him. In the present state of the record, I am by no means satisfied that he was improperly made a party, for he seems to have been an active agent in cutting timber and wasting the premises; and he may, perhaps, be made chargeable for the eloigning of the personal property between the execution of the first and second

contracts. The uncertainty as to his age does not permit us to say how far he may or may not be bound.

2. It is objected, "that no specific execution of a sale of personal property can be enforced; and that no lien on the personal property for the purchase money exists, especially when money has been paid by the purchaser, the possession delivered to him, and he is solvent." As to the first: the contract being for the sale of real and personal estate together for a lumping price, the specific execution can not be decreed as to the real estate alone; and as there is clearly jurisdiction as to that, it must carry with it jurisdiction as to the personalty also. As to the second point: it is unimportant whether or not an implied lien exists, for in this case there is ample evidence that Clarke was not to have a title until the purchase money was paid. This is obvious, both under the first and second contracts. By the first contract, indeed, which is very loosely worded, it is said, that the price was to be paid "when a deed should be made." But the parties certainly did not design this as fixing the time of payment. For the vendees would not have been willing to pay up the cash the day after the contract, if a deed had then been tendered. Both parties contemplated a credit, and bonds were accordingly given for two installments, payable in January, 1838, and June, 1839. Here then was a definite time appointed for payment, and no fixed time for making the deed; and where that is the case, the latter is not a precedent condition to the former: *Bailey v. Clay*, 4 Rand. 346. Besides it is clear, that by this contract, the delivery of the possession of the personal property, was not designed to operate to convey the title, as it is provided expressly, that it was to be conveyed by bill of sale. Under the second contract the retention of title is plain. Curtis agreed to execute a deed for the property to Clarke "whenever he should make the payments they should agree on." He was not then to have the property till he paid the money. A lien, therefore, clearly existed, and as to Clarke the sale was properly directed.

3. It is objected, that Colton & Clarke had purchased the property, and the plaintiff has not proceeded regularly as to them. That is nothing to Clarke; it does no injury to him. He violated good faith by attempting to sell to Colton & Clarke, when no bill of sale had been made to him as the contract provided for. I say attempting; for it may admit of question, whether, as the goods were still left at Perton, a constructive change of possession should be implied, against the rights of Curtis, from the mere order to deliver them.

4. It is objected, that the court has refused Clarke credit beyond his payment of one thousand dollars. I think it properly did so, upon the evidence in the case: yet there was enough in the evidence to justify sending the account to a commissioner. The failure to direct an account was therefore an error. So also was the omission to apply the proceeds of sale of the personalty to the discharge of the purchase money *pro tanto*.

There is a further error, in directing a sale of the lands without having required a proper deed to be previously executed by Curtis and wife, since a sale under such circumstances might have led to a sacrifice.

I think, too, the sale should have been for only one half cash, and the other half on a credit of twelve months. And the commissioners should have been directed to report their proceedings to the court for its confirmation, instead of paying over the purchase money without the previous ratification of the sale.

For these errors, the decree must be reversed and the cause sent back for further proceedings, according to the principles here declared.

I have omitted to observe, that the decree in this case, though apparently founded upon the original, instead of the substituted contract, is substantially correct; since the price was identical in both, and though the time of paying the first installment was varied, no change was made as to the time from which it was to bear interest. The amount due, therefore, would be the same under both.

BROOKE, CABELL, and ALLEN, JJ., concurred.

STANARD, J. This case is, in my opinion, a fit one for relief in equity. The circumstance that the contract sought to be carried into specific execution, embraced personal as well as real estate, does not preclude the court of equity from giving such relief. The principle on which that jurisdiction is exercised, does not depend on the subject of the contract being real or personal, but on the adequacy of the remedy at law to give full and effectual relief. When the subject of the contract is real estate, generally, if not universally, such full and effectual relief can be obtained in a court of equity only: whereas, when the subject is personalty, damages at law, in general, will afford the party injured adequate redress; but when this is not so, equity has jurisdiction to enforce specific execution of a contract for personalty, on the same principle on which the exercise of such jurisdiction, when the subject of the contract is realty,

is vindicated. Where (as in the present case) the subject of the contract of sale is mixed of real and personal estate, and a gross price to be paid, the jurisdiction is free from all reasonable doubt. Had the purchaser brought his suit for specific performance, there could not have been a doubt of the jurisdiction: for he, certainly, had not an adequate remedy at law. It is true he had possession of the personalty; but on that no separate value had been fixed by the parties. They, probably, made very different estimates of the value of it; and the consequence would be, if he were driven to a suit at law for damages for the failure of the vendor to convey, that he would be exposed to a claim for the estimated profits of the land which he had received and held as his own, and, in effect, made chargeable with an estimated value of the personal property, which might be equally at variance with the estimates of both contracting parties. Now, no principle is better settled than that the right to call for specific execution of a contract is reciprocal; when one of the contracting parties may call for specific execution, the other may too. In this case, the vendor's right to the aid of the court for specific execution, is vindicated by the further consideration that the circumstances of the case made it peculiarly fit for that jurisdiction. It is the case of a contract for land, of which there had been part performance, by surrender of possession, and payment of a portion of the purchase money; and where, in respect to the separate contract of Clarke, the purchaser in possession, there was no note in writing signed by him; and in respect to the first contract, the obligation of the three first purchasers had been canceled, and no remedy remained for the vendor against those parties as obligors. In such a case, the remedy at law was not only inadequate, but at best precarious and doubtful.

The vendor having properly resorted to equity for relief, what is the extent of his claim? The measure of Clarke's responsibility as to amount, is the purchase money which was to be paid under the first contract; namely, six thousand five hundred and eighty-one dollars, with interest from the first of January, 1838, and six thousand five hundred dollars, with interest from the first of June, 1839. That Curtis was to receive from Clarke, under the second contract, as much as he was entitled to claim under the first contract, and that the only variation from the first contract was a change, not in the amount of purchase money but in the time of making the first payment, is satisfactorily established by the parol evidence, by the written en-

gagement which Clarke took from Curtis to convey the property to him when the payments should be made, and the fact distinctly stated in Clarke's answer, that Curtis was willing to cancel the first contract altogether, and Clarke insisted on it. It is not to be credited, that Curtis would be willing to cancel a contract on which Clarke and two others were bound to him, in order that he might make a sale to Clarke alone for a smaller price, while Clarke was insisting on the contract by which he and two others were bound for a larger price. The decree is clearly right in this particular.

The opinion I have expressed places the right of the vendor to relief in equity on a foundation, of which his retention of a lien on the personal property for the purchase money forms no part. I am strongly inclined to think, that no such lien remained: that the delivery of the personal property, and the execution of the bonds by the purchasers under the first contract, passed the full property in that part of the subject to them, without any further act, and no lien upon it for the purchase money existed after the title in and possession of it had passed to the purchasers. The new contract made no change in this respect. It only converted the joint title in and possession of the personalty, before held by Clarke in common with the other original joint purchasers, into the sole title and possession of Clarke, and the joint responsibility of the original joint purchasers into a sole responsibility of him alone. But upon this point, my brethren hold a different opinion, and I readily acquiesce. As to all the other points, I concur with them.

The decree of this court declared, that the appellee Curtis properly sought and was entitled to relief in a court of equity, and that the measure of his claim, under the contract by which the appellant Clarke was substituted as sole purchaser, in place of him and his associates in the original contract, was the amount stipulated to be paid by the original contract, viz.: the sum of six thousand five hundred and eighty-one dollars, with interest from the first of January, 1838, and six thousand five hundred dollars, payable on the first of June, 1839. That the whole subject purchased, real and personal, remained in the hands of the appellant Clarke, chargeable with the purchase money; and though the precise date at which a part of the first mentioned sum of six thousand five hundred and eighty-one dollars was payable, is not ascertained, yet that part with interest thereon from the first of January, 1838, together with the rest of the purchase money, was due and payable at least as early as

the first of June, 1839. That the court below erred in decreeing the sale of the personal property, on the mere motion of the appellee, before the case was heard and his title to relief adjudicated, and before the amount of the lien thereon had been ascertained by a liquidation of the appellee's claim; and if that decree had not been executed, and the property sold under it, and in all probability dispersed, it would be proper to reverse that order, annul the sale under it, and order the restitution of the property; but as such a measure would afford the appellant Clarke, or those entitled to the property, no adequate redress, the appellee should be held accountable for the amount of the sales, he taking the benefit thereof, and his accountability therefor credited, whether the proceeds of the sales be collected or not, against the purchase money due from the appellant Clarke on the contract, unless in the further progress of the case, the title of Colton & Clarke to the property sold under the said order should be asserted and sustained. That before the court should have decreed the payment of the purchase money, the just balance thereof should have been liquidated, by an account in which the appellant Clarke should have credit (on the condition above expressed) for the amount of the sales of the personal property under the said order, and such other discounts, payments, or set-offs, as he might show himself entitled to. And that when the balance due of the purchase money should have been so ascertained, the court should have decreed, that the appellee should prepare and tender a conveyance with general warranty from himself and wife to the appellant Clarke; and if he, on such tender, should pay the balance of the purchase money, then the conveyance should be delivered; and if he should not pay it, then the conveyance should be deposited with the clerk of the court, to be delivered to Clarke, should he pay the said balance of purchase money before the sale of the land embraced by the contract, or to be held for the use of the purchaser under the decree of the court; and on such default of payment by the appellant Clarke on the tender of the deed, it should be further decreed that the said appellant pay to the appellee the balance ascertained as aforesaid, and that the land embraced by the contract should be sold on reasonable notice, on the terms that the purchaser pay one half of the purchase money in cash, and the other in twelve months, the title to be retained as a security therefor, and the land subject to resale under the further decree of the court, to raise the amount of the credit installment in default of the payment thereof. Therefore, the decree, so far as

it conflicted with the principles here declared, was reversed, and in all things else affirmed; and the cause was remanded to the circuit superior court to be further proceeded in according to the principles here declared.

SPECIFIC PERFORMANCE OF CONTRACTS.—For a thorough discussion of this subject see the notes to *Seymour v. Delancey*, 15 Am. Dec. 299; *Anderson v. Green*, 23 Id. 423; *Atwood v. Cobb*, 26 Id. 661; see also *Saltmarsh v. Beene*, 30 Id. 525; *Hays v. Hall*, Id. 530; *Wells v. Smith*, 31 Id. 274; *Ref. Prot. Dutch Church v. Mott*, 32 Id. 613; *Clark v. Seirer*, Id. 745; *Bass v. Mayor of Nashville*, 33 Id. 154; *Herrington v. Hubbard*, Id. 426; *Rogers v. Saunders*, Id. 635; *Clark v. Flint*, Id. 733; *Lewis v. Woods*, 34 Id. 110; *Patterson v. Martz*, Id. 474.

VENDOR'S LIEN.—The vendor's lien on realty is a doctrine of equity borrowed from the civil law, and is not a rule of the ancient common law: *Lupin v. Marie*, 21 Am. Dec. 256; the doctrine should not be extended beyond its proper limits, and ought not to apply where it is evident the parties never intended to apply it: *Moore v. Holcombe*, 24 Id. 683. The vendor has a lien on real estate for the purchase money: *Lagow v. Badollet*, 12 Id. 258; *Scott v. McMillen*, 13 Id. 239; *Tiernan v. Beam*, 15 Id. 557; *Lupin v. Marie*, 21 Id. 256; and he has a lien on goods sold when they are to be paid for on delivery: *Palmer v. Hand*, 7 Id. 392; and while the goods are in possession of the vendor: *Hobson v. Davidson*, 13 Id. 294 (though see *Lupin v. Marie*, 21 Id. 256). In *James v. Bird's Adm'r*, 31 Id. 668, it was held that the vendor of personal property had no equitable lien thereon for the price, even while the property remained in the vendee's hands. For a discussion of the subject of attorneys' liens, see note to *Andrews v. Morse*, 31 Id. 752.

ARMISTEAD v. COMMONWEALTH.

[11 LEIGH, 657.]

PARTY IS INCOMPETENT TO SIT AS JUROR who has formed and expressed a decided opinion as to the guilt or innocence of the prisoner.

WHERE PARTY FORMED AND EXPRESSED A DECIDED OPINION as to the prisoner's guilt, from a conversation with the prosecuting witness, he is incompetent to sit as a juror.

ERROR from the circuit superior court of Henrico county. Armistead was indicted for stealing a horse from Howard. In impaneling the jury, one Shook was called, and on examination as to his qualifications stated that he had had a conversation with Howard concerning the theft, shortly after it was committed; that from what Howard had said he had formed and expressed a decided opinion as to the prisoner's guilt. He further said that he had a high opinion of the veracity of the witness, but that the opinion he had formed would yield to the evidence; that he would try the case by the evidence and could

give the prisoner a fair trial, and that he had no prejudice against him. The prisoner challenged the juror for favor, but the court overruled the objection and said the juror must be accepted or challenged peremptorily. The prisoner excepted.

Lyons and Scott, for the prisoner.

Baxter, attorney-general, contra.

By Court, SCOTT, J. It was correctly remarked by the attorney-general, that it is not easy to lay down a rule which can be applied with certainty to every case that may arise. Such are the number and variety of the shades of opinion, from a slight and evanescent impression to the firmest and most deeply rooted conviction, that though the extremes may be readily discerned, it is often difficult to determine, where the impression that will not bias the judgment, deepens into an opinion which will turn the scale in a doubtful case. Nevertheless, it is proper that the court, in deciding a case before it, should not content itself with acting on the peculiar circumstances of that case, and leave others, not identical with it in all their features, to stand upon their own insulated grounds, but should look for principles, and adopt such as may conduce to the great end proposed in the selection of men to pass upon the liberty or the life of the citizen, who (in the language of the law) should "stand indifferent as they stand unsworn." To adopt such principles is to establish rules; and it is certainly desirable, that they should be as general as the nature of the subject will admit. This the court attempted to do in *Osiander's case*, 3 Leigh, 780 [24 Am. Dec. 693]. The criticism upon the language there employed, and the attempt to substitute other terms in defining the character of the opinion which should disqualify a juror, has not satisfied us that the definition attempted by the court in that case is not as precise and accurate, and as easily applied in practice, as any we can now give.

It was there said, that a person who has formed and expressed a decided opinion, that the accused is guilty or innocent of the offense for which he is about to be tried, is unfit to sit upon the trial.

It is supposed that there is difficulty in ascertaining the true meaning of the term "decided," when applied to opinion. When the question of the truth or falsehood of a proposition is presented to the mind, the wise and discreet examine, reflect, deliberate; and then, and not till then, decide. Some examine with more patience and perseverance, and reflect more pro-

foundly than others; some gifted beyond the ordinary lot of man, or fancying themselves endowed with an intuitive perception of truth and error, decide after little, nay almost without any, reflection: but whether the solution has been arrived at by the longer or the shorter process, the question no longer remains for deliberation; it is decided. Some minds are so skeptical, that they receive nothing as true, which is not proved by plain and direct evidence, or established upon mathematical demonstration; while others readily adopt the most absurd notions, though unsupported by anything like evidence, and destitute of all foundation in reason and in the nature of things. And we not unfrequently find opinions of the latter class as immovable as those which are the result of the most laborious investigation. The mind is, however, in both cases, made up; the question is settled; it is decided. And although both classes of persons may say, and believe they say truly, that they are open to conviction, willing to hear evidence and listen to reason, and either adhere to or abandon their opinions as these may dictate, few would be willing to stake their lives and fortunes on the success of an attempt to overturn opinions, which their professors fancy themselves to be thus willing to abandon at the command of truth and justice. The term "decided," used in the rule objected to, is (if anything) rather too strong and definite for the subject to which it is applied.

Let us see whether the terms proposed to be substituted, and by which it is said this case ought to be determined, are less liable to objection. It is said, that the opinion which should disqualify a man from being a juror, should be "strong and abiding." Now, is the word strong, when applied to opinion, more forcible than the word decided? We have on our minds some impressions which are weak, some strong, some stronger, and others which are decided, and which approximate very nearly to the strongest. But "the opinion should be abiding:" most certainly; for however strong and decided an opinion, or (to use a stronger word) a conviction may be, if it has been abandoned, no longer exists, no longer abides in the mind, it can not disqualify a juror. But if the term "abiding" be not used in this sense, but is intended to apply to the case of a person, who, although he has made up his mind, can not at the moment recall either the evidence or the process of reasoning which wrought the conviction, it should not enter into the definition. When we have made up an opinion on any question, we more easily recall the conclusion at which we arrive, than the

process by which we arrived at it; but when, upon an examination, that process is brought to our attention by others, or by an effort of our own memory, we are prepared to yield our assent to it, and far more readily adhere to our former opinions than adopt new ones.

Again, it is said, the opinion should be "deliberate and settled;" that at least there should be something of deliberation in the formation of it. It has been before remarked, that opinions are formed with more or less deliberation, and sometimes even without deliberation; and it can not be denied, that opinions of the latter class are, sometimes at least, adhered to with as much obstinacy as those which have been the result of the most patient inquiry. Still, however, it is admitted, that the greater or less deliberation with which an opinion has been formed, is an important consideration in the inquiry whether it is a decided one or not. But if this inquiry should lead to the conclusion, that the opinion under examination is a decided one, its having been formed without due deliberation, so far from removing the disqualification, adds to it: it proves, that the man who would thus lightly decide upon the guilt of his fellow-man, is unfit to take his seat among the good and lawful men who alone should sit upon the trial.

This view of the subject applies also to the kind of evidence on which the opinion is founded; whether it be conversations with witnesses, testimony given on a former trial, hearsay, or common report. The opinion will, generally, be more or less decided according to the nature of the evidence on which it is founded. But if it be decided, he who entertains it is not the better qualified to discharge the important duty of a juror, because he has founded it on common report. A philosophic mind accustomed to arrive at truth by painful and laborious research, may wonder that a rational being should pronounce his fellow man guilty of moral delinquency, upon no better evidence than common report; yet the evidence of history and our own observation prove that such things have happened, and do happen daily. The benignity of the law has thrown around all who are put upon their trial for crime, its protection against this imperfection of human reason and human justice. Therefore, if there be good cause to believe, that the accused has been prejudged by a large portion of those from among whom his triers are to be selected, the venue is changed. And equal care is taken, when he stands upon his deliverance, that his fate

shall not be placed in the hands of men by whom he is already condemned.

We, therefore, reaffirm the rule laid down in *Osiander's case*: that he who has formed and expressed a decided opinion, that the prisoner is guilty or innocent of the offense for which he is about to be tried, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, conversation with witnesses, or common report, is not fit to sit upon his trial. We go further, and say, that it is immaterial whether that opinion has been expressed or not.

It is supposed to be difficult to apply this rule in practice. The juror is, most commonly, the best judge whether or no his prepossessions amount to a decided opinion. If, however, upon ascertaining the sources of information that have been open to him, and the degree of reflection and deliberation which he has bestowed upon the subject, or the want of precision and accuracy of his notions of what constitutes a decided opinion of the prisoner's guilt or innocence, it should appear to the court, that the impressions are not such as are contemplated by the rule, the challenge for cause will be overruled. This will more frequently happen, when the opinion is founded on hearsay or common report; and, generally, opinions founded on mere reports in the country ought to be regarded as hypothetical, or so slight as not to disqualify the person entertaining them. But if upon a further examination it shall appear, that this is not the true state of the juror's mind, but that he has been so inconsiderate and unjust, as upon insufficient evidence, or no evidence at all, to have prejudged the prisoner's cause, he is doubly unfit to be trusted with it.

When the case at bar is brought to the test of the rule now stated and explained, there is little difficulty in deciding that the court below erred. The juror who was challenged, had conversed with the prosecutor, the most material witness for the commonwealth; and upon a statement of facts made by him, had formed, and still entertained, a decided opinion that the prisoner was guilty. It is vain for a man in this state of mind to say, that he would give the prisoner a fair trial; that he was not prejudiced against him; that he would judge him by the evidence, and decide according to the evidence. Whatever confidence he may have in his ability to erase from his mind the impressions made by his conversation with the prosecutor, of whose respectability and veracity he has no doubt, the law

has no confidence in him; however willing he may be to trust himself, the law will not trust him.

FIELD, J. I concur with the other judges in the opinion that the judgment in this case should be reversed. But I do not entirely concur in the opinion which has been delivered by Judge Scott. It seems to me that some of the principles set forth in that opinion, are in conflict with the decision of this court in *Maile's case*, 9 Leigh, 661. That case was decided by a very full court, after much debate and deliberation. I was one of the majority of the court which decided it: and I then thought that an opinion founded on mere rumor was a hypothetical opinion, and such as ought not of itself to disqualify a man from giving the prisoner a fair and impartial trial. I yet retain the same opinion: I am not willing to subscribe to principles that appear to me in conflict with the decision of *Maile's case*.

Judgment reversed, and cause sent back for a *venire de novo*.

IF A JUROR HAS FORMED OR EXPRESSED AN OPINION, this forms a good ground for a challenge: *People v. Mather*, 21 Am. Dec. 122. But a hypothetical opinion of a juror as to the guilt or innocence of the accused, founded upon what he has heard, does not disqualify him, but such an opinion can neither be a decided one, nor one formed on deliberation: *Osiander v. Commonwealth*, 24 Id. 693; *People v. Mather*, 21 Id. 122. As to opinion of juror sufficient to disqualify him from acting in the case, see the note to *Smith v. Barnes*, 36 Id. 515.

SLAUGHTER v. COMMONWEALTH.

[11 LEIGH, 661.]

DISTINCTION BETWEEN MURDER IN SECOND DEGREE AND MANSLAUGHTER is that malice is a necessary ingredient of the former, while in the latter it is wanting.

WHERE DECEASED MADE AN ASSAULT ON PRISONER, and the latter shot and killed him, not in consequence of the passion produced by the assault, but on account of a previous malice and determination to kill him, the crime is murder, and not manslaughter.

PETITION for a writ of error to a judgment of the circuit court of Petersburg. Slaughter was indicted for the murder of Pledge, found guilty of murder in the second degree, and sentenced. He moved for a new trial, which was refused. The judge certified the following facts: A threatening letter had been thrown into Slaughter's yard; he suspected Pledge of writing it, and Pledge, on hearing of this, rode over to Slaughter's house to

clear himself of the suspicion. There was some altercation, but Slaughter would not listen to any explanation, and Pledge started to ride away when Slaughter called him a very vile name. Pledge immediately dismounted and picked up a half brick and advanced towards Slaughter, who in the mean while had run into the house, armed himself, and returned. Pledge, at a distance of twenty-three yards, threw the brick, it striking a few feet from Slaughter, and breaking, a few fragments entering the door where Slaughter's child was standing, and who cried out. Slaughter then advanced upon Pledge to within twelve paces, with his pistol drawn and cocked, took deliberate aim, and fired. From the effects of the shot Pledge died in half an hour. There was testimony to the effect that Pledge had a brick in his other hand when he was shot. It appeared that he was in good temper till he had been called the vile name; that Slaughter was in a violent passion from the letter he had received, threatening him with lynching; that he had suspected the deceased of writing it, and had said he would kill him, together with several others, and had made preparations to resist any assault that might be made to carry the threat of lynching into execution. It also appeared that Pledge was connected with some conspiracy to lynch Slaughter, of which Slaughter was cognizant.

Collier, for the prisoner.

Baxter, attorney-general, contra.

By Court, JOHNSTON, J. The error complained of is the refusal of the circuit superior court to set aside the verdict, on the ground that it was contrary to the evidence; and this court is now called upon to review that decision upon the facts stated in the bill of exceptions.

The prisoner in his petition, and his counsel here in argument, contend, that the facts, as stated in his bill of exceptions, warranted a conviction only of manslaughter, and not of murder in the second degree; and upon the correctness of this proposition depends the decision which this court is now called upon to make. The distinction between these two offenses is too well established to admit of doubt in the present day. In the one, malice is a necessary ingredient; in the other, it is wanting. In the one, the crime is attributed to a wicked, depraved, and malignant spirit; while in the other it is imputed, by the benignity of the law, to human infirmity. If, for instance, death ensues from a sudden transport of passion or heat of blood, upon a reasonable provocation, and without malice, it

is considered as amounting only to manslaughter: 1 Russ. on Crimes, 486. But the person relying upon the plea of provocation, must make out the circumstances of alleviation to the satisfaction of the jury, unless they arise out of the evidence adduced against him; as the presumption of law deems all homicide to be malicious, until the contrary appears. He must show that sufficient provocation had been given, and that the act or blow which produced death was attributable to the passion of anger arising from that provocation. This doctrine is forcibly illustrated in the case of *The Queen v. Kirkham*, 8 Car. & P. 115; and of *The King v. Thomas*, 7 Id. 817; 34 Eng. Com. L. 318; 82 Id. 751. In the former it is said: "If a person has received a blow, and in the consequent irritation, immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing." In the latter, the judge says: "There is no doubt here, but a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault?" And so in the case before us, we may say, the deceased committed a violent assault upon the prisoner in throwing the brick at him; but did the prisoner shoot him in consequence of the ungovernable passion excited by that assault? or did he seize upon it as an opportunity of gratifying his previous malice, and carrying into effect a preconceived design to take the life of the deceased? These were questions that belong to the jury to decide, and if the record contains testimony from which the jury might reasonably conclude, as they did, that the killing was the result of malice aforethought, then it would be an invasion of their province for this court to interfere and set aside their verdict. But if, on the other hand, there were no evidence contained in the facts as certified (which constituted all the testimony in the case), from which this conclusion might be reasonably drawn, then, undoubtedly, it would be the duty of this court now, as it would have been the duty of the court below, to set aside the verdict, and direct a new trial.

Without going into a minute detail of the evidence here, this court is of the opinion, after a careful examination of all the testimony stated in the bill of exceptions, that the jury were well

justified in the verdict which they rendered against the prisoner. The evidence clearly shows, that he considered the deceased the author of the anonymous letter thrown into his yard, at the very sight of which he became so "violently excited," that a member of his family threw it into the fire to prevent him from seeing it again: that two days before the fatal occurrence, he declared, that he would kill a man named Sykes, and the deceased, and two or three other damned rascals in Blandford, and then would be satisfied;" and he told Jones, the day before the homicide, that he believed the deceased wrote the anonymous letter: and that he prepared the pistols, and a scythe-blade, some nights previous to the homicide, as a means of defense against the attempt to lynch him, threatened in the letter. These antecedent declarations and circumstances, coupled with the conduct of the prisoner when the deceased went to see him for the purpose of convincing him that he was not the author of the offensive letter; his refusal to listen to his explanation; his violent manner and abusive language; fully authorized the jury in coming to the conclusion, that the deceased fell a victim to the malice and revenge entertained towards him by the prisoner, from the time the anonymous letter was first thrown into his yard.

But throwing out of view everything that occurred anterior to the day on which the killing took place, and confining our consideration to what then occurred entirely, this court is of the opinion, that the facts proved make out a case of murder, and not of manslaughter only. "If, after an interchange of blows on equal terms, one of the parties on a sudden and without any such intention at the commencement of the affray, snatches up a deadly weapon, and kills the party with it, such killing will be only manslaughter. But if a party, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other party;" or, "if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with such weapon, the killing, in both these cases, will be murder:" 1 Russ. on Cr. 446. Now, the application of these principles to this case is easy and obvious. The prisoner at the beginning of the contest, so soon as he saw the deceased in the act of dismounting from his horse, ran into his house and armed himself with a deadly weapon (as we are bound to infer from the evidence), returned, and placed himself on the sidewalk, with his hands in the pockets of his pantaloons. So soon

as the deceased, who was at the distance of twenty-three yards, threw the brickbat at him, the prisoner "rushed" towards him, drew from his pocket a pistol, cocked it, advanced to within twelve paces of the deceased, took deliberate aim, and fired, while the deceased was retreating slowly with his face towards the prisoner; then drew forth another pistol, but before he fired that, the deceased fell, mortally wounded. Here, we have the preparation of the deadly weapon beforehand, the use of that weapon from the beginning, and the fatal fire given when his adversary was actually retreating. Surely this was murder; and these facts would have justified the verdict, even if no previous malice had been proved.

Writ of error denied.

DISTINCTION BETWEEN MURDER AND MANSLAUGHTER: See *Pennsylvania v. Bell*, 1 Am. Dec. 298; *State v. Norris*, Id. 564; *State v. Roberts*, 9 Id. 643; *Grainger v. State*, 26 Id. 278; *State v. Ferguson*, 27 Id. 412; *Bower v. State*, 32 Id. 325; *State v. Hill*, 34 Id. 396.

RAYNOLDS v. CARTER.

[12 LEIGH, 166.]

CONTRACT IS USURIOUS, WHEN.—A party borrowed a sum of money from another, and for security pledged a slave, the lender to have the use of the slave for interest, as the value of the slave was greater than legal interest on the sum advanced, the contract was held usurious.

BOND GIVEN TO REDEEM SLAVE IN SUCH A CASE is usurious and void.

USURIOUS BOND IS VOID IN HANDS OF THIRD PERSON, not an assignee for value, without notice.

DEBT on bond executed by J. and T. Reynolds and Wigginton to the plaintiff Carter, as administrator of Jackson. The defendants pleaded the statute of usury. The following facts were agreed upon: Jackson advanced two hundred dollars to T. Reynolds, who put into Jackson's hands a slave, whose labor and services were to go for the interest of the money. The value of the slave's services was from fifty dollars to sixty dollars a year. Jackson kept possession of the slave for some time, and after his death, the defendants executed to the plaintiff the bond on which suit is brought to redeem the slave. The slave was given up by Carter when the bond was executed. The county court gave judgment for the plaintiff; and the circuit superior court of Fredericksburg affirmed the decision. The defendants applied to this court for a *supersedeas*, which was allowed.

Leigh, for the plaintiffs in error.

Johnson and Cooke, for the defendants.

TUCKER, P. The judgment in this case is, in my opinion, clearly erroneous. Two questions are made: 1. Whether the original contract was usurious? and, 2. Whether Reynolds, by giving the new bond, has lost the right of setting up the defense of usury?

As to the first, it was argued that there is no usury, because the principal sum was put in hazard, and the money was not to be returned at all events. If this were so, and it did not appear that the scheme was resorted to as a device to avoid the statute against usury, there could be no question that the transaction would not be usurious. But I think the proposition is itself a false inference from the facts proved. Because the proof is that the slave was to be returned when the money was paid, it seems to be supposed that the lender had no right to demand payment, and that it was at the borrower's option to retain the money as long as he pleased, even though the slave should die or prove unprofitable. I do not think this a fair construction of the transaction. Such an arrangement might indeed have been made, but it was not made. The transaction was a simple loan of money, without a day of payment being fixed, and the pledge of the slave for its security was but collateral. If there had been no pledge, it could not have been denied that the money might have been demanded presently. But the taking the pledge was not designed to change the contract, but to enforce the performance of it. There was nothing in the language of the bargain from which it could be inferred that the lender intended to take the risk of losing his money, and to waive the legal effect of the loan by which it might be demanded at any moment. It seems, therefore, clear, that the lender had a right to require repayment when he pleased, upon the stipulated terms of surrendering the pledge; and it is equally clear, that if the slave had died, he would nevertheless have been entitled to his money; for the pledge was given to secure repayment, and not as a substitute for it.

This view of the case is fully sustained by the cases cited by Mr. Leigh on the subject of pledges. In case a pawn be lost without the fault of the pawnee, he has still his remedy for the money against the pawner: *Radcliff v. Davis*, Yelv. 17, 179; *Anon.*, 2 Salk. 523; opinion of Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 917; *Anon.*, 12 Mod. 54; *Manly v. Westbrook*, Bull

N. P. 720. And the rule must be the same, where the property pledged dies, as where it is lost. So, in *South Seal Co. v. Duncomb*, 2 Stra. 919, it was held, that where money is lent generally upon a pledge, it will not deprive the lender of his remedy against the person of the borrower; and that to discharge the person, there must be a special agreement to stand to the pledge only. The same principle is affirmed in *Thomas v. Terry*, 1 Eq. Cas. Abr. 139, pl. 5, and recognized by this court in *Price v. Williams*, 5 Munf. 507, where there was such special agreement. Every pledge implies a loan, and every loan implies a debt: *King v. King*, 3 P. Wms. 360. And if the pledge be destroyed, the payment of the debt may still be enforced against the person: 3 Bac. Abr., Bailment, B, 370 (citing Yelv. 179; Co. Lit. 209), where it is laid down, that if a man lend perishable goods as a pledge, and they decay, yet the pawnee may have debt for his money, for the duty continues. These authorities are all decisive of this case, unless it can be shown to have been the intention of the parties that the lender should look only to the pledge, and that in no event was he to have a charge upon the person. But this does not appear in the case. There was then a personal obligation to repay, and of course the principal never was in hazard. The contract was usurious.

The next question is, whether the giving the bond by Reynolds to the administrator of Jackson, deprives him of the defense that the original contract on which it is founded was usurious? I think it very clear, that the contract is not purged of the usury. If it were, the bond would indeed be valid; for though the original contract be usurious, yet if no part of the usury has been received, and a new security is given for the principal sum with legal interest only, it is good. In such case, the parties having repented of the usury, and purged the contract of its taint, the new security has only bound the debtor to fulfill a moral obligation by paying what he had borrowed: for he could not even be relieved in equity against the usury without doing this: *Barnes v. Hedley*, 2 Taunt. 184. But where any part of the new security is for any portion of the usury, or where, after receiving the usury, the lender takes a new security for the principal, it is void; for it is a security given to further the usurious contract, and its direct effect is to give full efficacy to the original corrupt agreement. In truth, the avails of the slave's hire, in this case, were applicable to the principal, in part, at least. Of course, there was not two hundred dollars due of principal. A part of the two hundred dollars, therefore, was interest, and usurious

interest included in the bond, which, consequently, was void: *Wickes v. Gogerly*, 1 Car. & P. 396; 11 Eng. C. L. 434.

It was argued, that the bond being taken to a third person makes a difference. And this is true, where the third person is not a volunteer, but an assignee for value: and then, if the assignee is ignorant of the usury, the new security will estop the party who gives it from pleading the usury; otherwise not: *Chapman v. Black*, 2 Barn. & Ald. 588; *Cuthbert v. Haley*, 8 T. R. 390. According to our decisions, in cases of the kind, the debtor must hold out inducements to the third person who purchases it, to deal with the claim; else, the debtor will not be deprived of his defense: *Buckner et al. v. Smith et al.*, 1 Wash. 299 [1 Am. Dec. 463]; *Hoomes v. Smock*, Id. 389; *Woodson et al. v. Barrett & Co.*, 2 Hen. & M. 80 [3 Am. Dec. 612]; *Mayo v. Giles' Adm'r*, 1 Munf. 533. And the reason of his being bound is, that by his *mala fides* in concealing the consideration and inducing the assignee to pay his money for the claim, he has exposed him to a loss. But this reason can not apply to the administrator of the lender, who takes a bond for an usurious debt; he stands in his intestate's shoes. He has sustained no loss, and unless he acts foolishly, he can not sustain any. The debt is not assets till recovered, and it is his own folly to treat it as such, either by applying it to the payment of debts or by distribution. But admitting the contrary, it would only afford a ground for relief in equity against the defense of usury, upon proof that the administrator had actually treated the bond as assets, and paid or distributed the amount of it in advance. The suggestion that he might do so, is not enough to deprive the debtors of the defense of usury.

The other judges concurred. Judgment reversed, and judgment entered for the plaintiffs in error, defendants below.

BROOKE, J., absent.

WHAT TRANSACTIONS ARE USURIOUS: See *Gibson v. Fristoe*, 1 Am. Dec. 502; *Bush v. Livingston*, 2 Id. 316; *Watkins v. Taylor*, 5 Id. 486; *Lloyd v. Keach*, 7 Id. 256; *Munn v. Commission Co.*, 8 Id. 219; *Dunham v. Gould*, Id. 323; *Greenhow v. Harris*, Id. 751; *Fanning v. Dunham*, 9 Id. 283; *Trotter v. Curtis*, 10 Id. 211; *Nourse v. Prime*, 11 Id. 403; *Bank of Elizabeth v. Ayers*, Id. 535; *Ruffin v. Armstrong*, Id. 774; *Flemming v. Mulligan*, 13 Id. 707; *McNairy v. Bell*, 24 Id. 454; *Bank of Chillicothe v. Swayne*, 32 Id. 707; *Foote v. Emerson*, 33 Id. 205.

EFFECT OF USURY WHERE CONTRACT IS RENEWED: See *Glisson v. Newton*, 1 Am. Dec. 559; *Chadbourn v. Watts*, 6 Id. 100; *Bridge v. Hubbard*, 8 Id. 86; *Warren v. Crabtree*, 10 Id. 51; *Early v. Mahon*, Id. 204; *Swartwout v. Payne*, Id. 228; *Motte v. Dorrell*, Id. 675; *Bank of Elizabeth v. Ayers*, 11 Id. 535; *Flemming v. Mulligan*, 13 Id. 707.

ROSS v. MILNE.

[12 LEIGH, 204.]

RIGHT TO SUE ON INDENTURE FOR BENEFIT OF THIRD PERSON is, at law, confined to the parties to it; the beneficiary can not sue on it.

PAROL CONTRACT FOR BENEFIT OF THIRD PERSON confers no rights on the third person, unless there has been an executed gift, or he has paid a valuable consideration.

ASSUMPSIT IS PROPER REMEDY TO RECOVER ON CONTRACTS of third persons, and not debt.

DEBT by Milne and wife against Ross. Janet Smith, the mother of Mrs. Milne, entered into a contract with Ross, by which he agreed to pay Mrs. Milne, or her executors, a certain sum within two months after the decease of the said Janet Smith. Mrs. Smith having died, and two months having passed since that time, this suit was brought. The defendant contended that Milne and wife could not maintain this action; that even if they could, debt was not the proper action to bring. The declaration contained two counts; these sufficiently appear from the opinion. Verdict and judgment for Milne and wife; upon application to this court a *supersedeas* to the judgment was allowed Ross.

Morson and Moncure, for the defendant in error.

Patton and Stanard, contra.

TUCKER, P. The preliminary question in this case is, whether the plaintiffs can recover under either of the counts in this declaration? The first is upon an indenture between Janet Smith and the defendant, in which he promises to pay Mrs. Milne five hundred pounds sterling. To this indenture Mrs. Milne is no party, and therefore, upon well-established principles, she can not sue upon it at law. Whether such a trust or interest is created for her benefit, as will enable her to sue in equity, it is not necessary in this case to inquire. It is sufficient that she can not sue at law. The right to sue under an indenture *inter partes* is confined to the parties to it: Platt on Cov. 7, 8; 1 Chit. 4, and the cases there cited; *Salter v. Kidgley*, Carth. 76; *Offly v. Ward*, 1 Lev. 235; *Gilby v. Copley*, 3 Id. 138. In *Barford v. Stuckey*, 2 Brod. & Bing. 333, the defendant, by indenture between himself and N. Pitts, agreed to pay him an annuity for twenty-one years, and if he died within the term, then it was agreed and promised, that he should pay the annuity to his child or children: the administrator of his only child brought debt

for the annuity. Dallas, C. J., said: "It is a general principle, that the right to sue under a contract is confined to the parties to the deed. The consideration did not move from the child, but from the father, and the obligation arises out of the contract itself. It is admitted that an action might have been brought by the administrator of N. Pitts, and if he had recovered, he would have been a trustee for the child; and if he had refused to sue, he might have been compelled by a court of equity to lend his name." He then declares, that the suit ought to have been brought by N. Pitts' administrator, and was improperly brought by the administrator of the daughter of N. Pitts; and so the court decided. A distinction, however, has been taken between the action of covenant and the action of debt, and it is supposed that the latter may lie, though the former will not. For this distinction we have no authority, nor do I think it can be sustained. The right of the administrator to sue in covenant can not be denied; and if the beneficiary could also sue in debt, the defendant would either be twice charged, or, as Dallas, C. J., says, the court would be called upon to stay one of the actions. And thus, by the informal proceeding of a rule, the rights of the plaintiffs in the two causes would have to be determined. Such a course can not be commended. It is better to adhere to the distinction of jurisdictions and of the forms of action, than to encounter the confusion which would ensue from departing from them. Therefore, I am of opinion, that the count upon the indenture is naught, and that no judgment upon it can be rendered in favor of the plaintiffs.

The second count sets forth the contract as a parol agreement between Janet Smith and the defendant Ross, by which, in consideration of the transfer of her interest in Colin Ross' estate, the defendant promised to pay the plaintiff Mrs. Milne five hundred pounds sterling in two months after Janet's death. Waiving the question, whether there is not a misjoinder of action, or whether this count be in debt or assumpsit, I shall proceed to these positions: that Mrs. Milne had no rights whatever under the contract as laid; that if she had, they could not be asserted at law, or if they could be so asserted, it could not be by action of debt, but only by special action on the case in assumpsit.

First, Mrs. Milne had no rights under this alleged parol contract. To give her any right whatever, there must either have been an executed gift, or a valuable consideration. A gift without consideration confers a right, provided it is complete by delivery; and a grant, though incomplete, will confer a right if

there be a valuable consideration. Thus, not only does a gift to a child, accompanied by possession, pass the title, but if one give chattels by deed, and deliver the deed to the use of the donee, though a volunteer, the goods and chattels are immediately in the donee: *Butler and Baker's case*, 8 Co. 26 b. For the deed is an executed contract: it passes all title out of the grantor, even without the delivery of possession. And if, in such case, the transfer is to one person for the benefit of another, the whole title passes at once by the deed from the grantor to the grantee. Of consequence, the grantor's rights are gone, and as the grantee gave no value, he holds as trustee for the third person, who thus becomes invested with the right by the declaration of trust in his favor, even though he has paid no consideration. On the other hand, though there be no deed, yet if there be a valuable consideration, the rights of the third party may be irrevocable. Thus if A. owes one hundred pounds, and delivers that sum to B. to pay over to C., his creditor, A. can not countermand it, and C. may sue for it as money had and received for his use: *Farmer v. Russell*, 1 Bos. & Pul. 296; though this seems to have been otherwise decided on the ground that the party may have subsequently paid the debt: *Turberville v. Porter*, Dyer, 49, a, in note. And see also *Surtees v. Hubbard*, 4 Esp. 203. It is, however, on this principle, that the case cited in argument of *Weston v. Barker*, 12 Johns. 276 [7 Am. Dec. 319], must rest. That was the case of a trust, in which the grantors had conveyed certain securities for discharging certain debts, and the balance to be held subject to their order: for that balance they gave the plaintiff an order, he being a creditor of theirs, and the defendant had notice of the order. The acceptance of the trust was held equivalent to an express promise by the trustee to pay to the grantor's order, and the order being given for payment of a debt, and the funds being in the trustee's hands, it was held that assumpsit would lie for it. But where there is no consideration, and the contract is by parol, nothing passes to the third person by the promise to pay to him. That promise is at all times revocable before payment.

Thus if a sum of money be delivered to J. S. to the use and behoof of a woman to be delivered to her at her day of marriage, and before the marriage the bailor revokes it, it seems to be the better opinion that the order was countermandable, notwithstanding the money had passed out of the hands of the grantor, and the gift therefore seemed executed as to him: *Lyle et Ux. v. Penny*, Dyer 49, a. The reasoning of Shelley in that

case, shows the principles on which the case was decided: he said, "that gifts, though commenced, are of no force if they be not completed" — "for when a man makes such a sort of conditional gift, of his mere will and good pleasure, and delivers the thing into indifferent hands to keep for the use of a stranger, still, before the condition is performed, the bailment is revocable. For if a man deliver to his servant on new year's day a golden cup, to give as a new year's gift to a stranger, clearly he may countermand this, notwithstanding the gift, for this was not a gift perfectly executed. And there is a difference when a man makes a gift or bailment to give to a stranger upon a consideration or former duty." "And the law is the same when a thing is delivered in consideration, satisfaction, or recompense of another thing; there he can not countermand. And so here, if the case had been, that the bailor had been to be bound by covenant, in consideration of a marriage precedent, to pay such a sum, then could he never revoke it; for this alters the property immediately; but it is otherwise of a mere gift without any cause precedent." There is indeed no proposition more clear, than that personal property can only pass by deed, or delivery of possession; and it is not less true, that choses in action are not assignable at all at common law, though the delivery of the documentary evidences of debt, for value received, may pass an equitable title to it. In this case, there is neither valuable consideration, nor delivery of any documentary evidence of the debt. It can not therefore amount to a gift, or even to a promise to give. For there is no promise to Mrs. Milne, either from the defendant Ross or from Mrs. Smith. It was but an order to her debtor to pay money due to her, to her daughter, which order she had a right to countermand, and of course there was no vested right in the plaintiffs which they can enforce against any one. If a gift of personal chattels without deed, or delivery of possession, is inoperative and void, the gift of a chose in action, without delivery and assignment of some documentary evidence of the debt, would seem to be even yet more clearly nugatory. For at common law even a bond could not be assigned, because it is but a chose in action. In equity, indeed, the assignment is held good, but even there, not without a valuable consideration: 1 Bac. Abr., Assignment, 249; *Perkins v. Parker*, 1 Mass. 117. And courts of law now permit suits in the name of the obligee for the benefit of an assignee for value. Upon these principles, it is not perceived how an oral chose in action can be assignable, so as to give the assignee.

even for value, a right to sue in his own name; and the objection is *a fortiori*, where there is no consideration. There is nothing of which even a symbolical delivery can be made, and therefore there can be no valid, binding, and executed gift. As in this case, Ross was the debtor of Mrs. Smith, and if by the oral agreement with her, that he would pay the money to Mrs. Milne, the latter acquired a right to sue for this chose in action, without consideration, without a promise or agreement with her, and without any act amounting to a transfer of the debt, then it would seem, that the principles of the law which inhibit the assignment of choses in action are unsubstantial and deceptive. For my own part (with Lord Kenyon, 1 East, 104), I think it safest to resist the overthrow of the principle which forbids such assignment.

Fink v. Fink's Ex'r, 18 Johns. 145 [9 Am. Dec. 191], is a case which involves some of these principles. Alexander Fink, in his life-time, executed his promissory note to his son for one thousand dollars, payable at sixty days; declaring, when he did so, that he intended to give it to him absolutely; but there was no valuable consideration; an action by his son against his executor having been brought, it was decided, that it could not be maintained. Spencer, J., said: "A promise to pay money as a gift, is no more a ground of action than a promise to deliver a chattel as a gift." "There is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held to be sufficient. In such case, the consideration must be a valuable one, for the benefit of the promiser, or to the trouble, loss, or prejudice of the promisee. The note here manifested indeed an intention to give the one thousand dollars. It was, however, executory, and the promiser had a *locus pœnitentiæ*. It was an engagement to give, and not a gift." In our case, there was not even a promise or engagement to give. There was only an oral promise by the debtor to the creditor, that he would pay the debt to the third person; and this promise the creditor had, at all times before payment, a right to release or countermand.

This case, however, has been attempted to be supported upon authority, and the case of *Dutton and Wife v. Poole* (which may be considered as the foundation on which others rest) has been confidently relied on. It was an action on the case, and appears to have been in assumpsit. The declaration is rather more at large in Sir T. Raymond's report than elsewhere, but

even there no assumpsit from the defendant to the plaintiff is laid; which, however, does not seem to have been a litigated point. The plaintiff declared, that his wife's father being about to cut down timber to raise one thousand pounds for her, the defendant, his son and heir, promised the father, if he would forbear, he would pay the one thousand pounds. He did forbear, and the son failing to pay, this suit was brought; and it was decided that the right to sue was in her, and not in the father or his executors. The propriety of this judgment I am not disposed to controvert. The father had kept his timber and suffered no loss: but he had designed to provide his daughter a portion, and the son's promise prevented. To refuse to fulfill his promise was a fraud upon the sister, and the loss to her was a sufficient consideration to sustain a special action on the case. But in the case at bar, there was no loss shown or averred, which could constitute a consideration to support an action by the daughter. The case of *Dutton and Wife v. Poole*, therefore, is not an authority in point to that before us. *Felton v. Dickinson*, 10 Mass. 287, was also cited. There, a father bound his son to a trade, and the master agreed in consideration of his services to pay him a certain sum at his full age. The son served out his time, and at maturity brought and maintained the action. His services were the consideration; and as it moved from him, and the promise to his father was for him, he being a minor, it was in effect a promise to himself. As to *Schemerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 104], the decision, as to the point now before us, was extrajudicial; for the case went off on another point, and instead of being decided in favor of the plaintiff, was adjudged against him; so that this point seems to have been but little considered. The case of *Pigott v. Thompson*, 3 Bos. & Pul. 147, contains but an *obiter dictum* of Lord Alvanley, in which his brethren differed from him; though I am ready to admit the correctness of his proposition, wherever the promise to pay to the third person is on valuable consideration, or where the consideration moved from that person himself, as was the case of *Louther v. Kelly*, 8 Mod. 115. All the other cases which have been reviewed or referred to by the bar, in which the action by the third party has been sustained, will be found, I think, to be cases in which a valuable consideration moved from him, or the money was directed to be paid over in discharge of a debt due to him. Such was the case of *Ward v. Evans*, 2 Ld. Raym. 928; *Israel v. Douglass*, 1 H. Bl. 239; *Weston v. Barker*, 12 Johns. 276 [7 Am. Dec.

819], in which last, however, Spencer dissented in a strong opinion. The whole of these cases depend upon these legal principles: that choses in action are not assignable; and that no executory contract has any force unless sustained by a valuable consideration. The first is a rule of law adopted for the prevention of maintenance; and though it has, in modern times, been somewhat relaxed, it is still a ruling principle. It was early admitted, that an assignment for value was good in equity; and the assignee is now also permitted to sue at law in the name of the assignor, but he can not sue in his own name. Nor can the assignee sue at law or in equity, unless he is an assignee for value, as has been already shown. The second principle is universal. No executory contract has any force, unless it be for value; and moreover, wherever a valuable consideration is essential to an agreement, the legal interest in the simple contract resides with the party from whom the consideration moves, notwithstanding it may inure for another's benefit, or even is to be performed to another person. From want of attention to the true principle of the cases, there is some apparent conflict among them, some having gone farther than others in encroaching upon the established rules against the assignment of choses in action. Thus, if I deliver a sum of money to B., to pay over to C., who is my creditor, the money may be sued for by C. as money had and received to his use: *Wheatley v. Low*, Cro. Jac. 668; *contra*, *Crifford v. Berry*, 11 Mod. 241. And if I have money belonging to B. and promise to pay it for him to C., he, C., may sue for it in his own name, since by the agreement the money has changed owners, and I have become C.'s agent as I was B.'s before: *Surtees v. Hubbard*, 4 Esp. 203. This is all clear enough: but not content with going thus far, it has been decided, that if I give goods of the value of ten pounds to B., to pay to C., C. may sue, the parties having considered and treated the goods as money: 1 Roll. Abr. 32, pl. 13. And where A. was indebted to B., and B. to C., and B. gave an order to A. to pay C., and the order was accepted by A., C. was admitted to sue A. for the amount. This case has indeed been questioned, though I think without sufficient reason, since A.'s acceptance formed a new contract, for which the transaction furnished a sufficient consideration.

Upon the whole, therefore, I am of opinion that Mrs. Milne had no rights under this supposed contract. But if she had, I am still of opinion they could only be enforced in equity. For it is not perceived, that Mrs. Smith's representative has no con-

cern or interest in the matter: he represents her with whom the contract was made by Ross, and from whom the consideration moved. Accordingly, in one case, where the right of the beneficiary to sue was sustained, the right of the promisee to sue was also admitted: *Bell v. Chaplain*, Hard. 321. But this leads to one of two consequences; either that the recovery here would not be a bar to the suit of the representative of Mrs. Smith, or it would be a bar. If it would not be a bar, then the defendant would be twice charged: if it would be a bar, then the representative of the promisee would be concluded by a proceeding to which he is no party. If, then, Mrs. Milne has rights, it is safest that they be asserted in equity, where all the parties can be convened; or that, at least, the suit should be brought in the name of Mrs. Smith's administrator, that, by being a party upon the record, any controversy between him and Mrs. Milne, as to her rights, may be collaterally decided by the usual proceedings in similar cases.

Lastly, admitting Mrs. Milne's right to sue at law, I do not think she can maintain debt. *Dutton and Wife v. Poole*, and all the cases founded on it, were in assumpsit. If entitled to sue, she must sue upon the special promise only; for Ross was never her debtor. This distinction, which prevails in many cases, is strictly applicable here. Thus, debt will not lie against the acceptor or indorser of a bill of exchange (except by statute), but the action lies upon the special undertaking. Nor will it lie on any collateral contract, as on a promise to pay the debt of another in consideration of forbearance: *Anonymous*, Hard. 486; *Bishop v. Young*, 2 Bos. & Pul. 78, 83; *Hard's case*, 1 Salk. 23. Nor will it lie for a wager: *Bovey v. Castleman*, 1 Ld. Raym. 69. In this case, it is clear that if Ross was liable at all to Mrs. Milne, it was upon the express contract, and not as her debtor, which he never was.

It only remains to observe, that the want of title in Mrs. Milne can not be cured even by the omnipotent act of jeofails. That act never could have been designed to enable a plaintiff to recover what by his own showing belongs to another person. The judgment, then, in this case, should have been for the defendant, *non obstante veredicto*.

The other judges concurred. Judgment reversed, and judgment for Ross, defendant below.

STANARD, J., absent.

THIRD PERSON FOR WHOM BENEFIT CONTRACT IS MADE CAN SUE ON IT, though he is not present when it is made: *Schemerhorn v. Vanderheyden*. 3

Am. Dec. 304; *Smith v. Kemper*, 6 Id. 708; *Arnold v. Lyman*, 9 Id. 154; *Rodney v. Shankland*, 12 Id. 70; *Tuttle v. Catlin*, Id. 691; *Marigny v. Remy*, 15 Id. 172; *Dearborn v. Parks*, 17 Id. 206; *Kelly v. Evans*, 24 Id. 325; *Hind v. Holdship*, 26 Id. 107. The principal case is cited in support of the position, that there must be a privity of contract between plaintiff and defendant, to render defendant liable to an action by the plaintiff on a contract, in *Mellen v. Whipple*, 1 Gray, 321.

WHEATLEY'S HEIRS v. CALHOUN.

[12 LEIGH, 264.]

REALTY PURCHASED BY TWO JOINTLY IS NOT PARTNERSHIP PROPERTY, though they are to carry on the business of milling therewith.

PURCHASE BEING ON INDIVIDUAL RESPONSIBILITY IN SUCH A CASE, the payment of one of the installments out of the partnership funds does not convert the realty into partnership property.

DEED OF TRUST IS SUPERIOR TO RIGHT OF DOWER, when it is given to secure the payment of the purchase price.

DEED OF TRUST FOR PROPERTY JOINTLY PURCHASED will be continued for the benefit of one party, so far as he has made payments beyond his just proportion of the debt.

RIGHT OF DOWER WHERE PROPERTY SOLD UNDER TRUST DEED would attach to the husband's share of the proceeds after the debt secured was paid.

BILL in chancery by Mary Ann Calhoun, widow of John Calhoun, against James Wheatley's heirs, claiming dower. Wheatley and Calhoun agreed to jointly purchase a tract of land; Wheatley to make arrangements with the vendor for payment, and Calhoun subsequently to pay Wheatley. The land was all conveyed to Wheatley, who never conveyed to Calhoun the latter's share. A piece of property called the New Mills, and two hundred acres of land adjoining, were about to be sold, and Calhoun and Wheatley entered into an agreement to jointly purchase it, and did purchase it. The purchase money was to be paid in installments. To secure these, the purchasers were to give their bonds and to execute a deed of trust of the premises to one Roberts. This deed of trust was executed in March, 1824. Their wives did not join in the deed. Calhoun had paid some money on the first agreement to Wheatley, but it was agreed between them that Wheatley should take back the land, and the amount paid by Calhoun should be credited to his share of the purchase money of the New Mills. Wheatley and Calhoun, after purchasing the New Mills, for several years carried on the business of milling. The greater part of the first installment was paid from the proceeds of the business, and to meet the other installments they borrowed

money from the Fredericksburg bank, on their own notes. These notes were renewed from time to time till after the dissolution of the partnership, when Wheatley and his wife and Calhoun joined in a deed of the New Mills and the land to a trustee, to sell the property and apply the proceeds in discharge of the debt due the bank. Calhoun's wife positively refused to join in the conveyance. Under this deed the property was sold, and Wheatley, for a fair price, became the purchaser. He held the land till his death, and the widow of Calhoun brought this suit against his heirs to recover dower of her husband's portion of the first tract purchased, and of his part of the New Mills and the land surrounding it. She was allowed dower of both tracts; from this decree the defendants appealed.

Morson, for the appellants.

Moncure and Robinson, contra.

TUCKER, P. This cause has been argued with very great ability by the counsel on both sides, and the court is much indebted to them for the light which has been shed upon the various points in the case.

The appellee's claim of dower in the New Mills, etc., is contested, first, because, as is alleged, the property was purchased, held, used, and paid for, as partnership property; and therefore was chargeable with partnership liabilities, and properly to be regarded as personal estate, not liable to any dower right of Calhoun's widow. Whatever doubts may have heretofore existed, as to the light in which real property is to be considered, when bought and used by a commercial partnership for the purposes of the concern, it is now well settled, that it is to be looked upon as forming a part of the partnership funds. Such is, at present, the received doctrine in England: *Phillips v. Phillips*, 1 My. & K. 649; *Broom v. Broom*, 3 Id. 443; *Randall v. Randall*, 7 Sim. 271; 7 Cond. Eng. Ch. 208; 9 Id. 118; 10 Id. 52; and so this court has decided: *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh, 406. In the present case, however, I look upon the partnership as not comprehending the mills and land: I consider Wheatley and Calhoun as joint owners of the realty, and partners only in the milling business carried on upon the property. There may, indeed, be partnerships in the business of milling, or mining, or farming; but unless the intent of the joint owners to throw their real estate into the fund as partnership stock, is distinctly manifested, or unless the real property is bought out of the social funds, for partnership purposes, it

must still retain its character of realty. Considering the partnership as a third person, the titles of the individual partners can not be passed to it, perhaps, without violating the statute of frauds, unless it be by express agreement in writing, or unless, by purchasing with partnership funds, an implied trust is raised in its favor. In this case, I see nothing from whence to infer, that there was any design on the part of these joint purchasers to convert their real estate into partnership stock; nor am I better satisfied, that the property was purchased with, or paid for out of, partnership funds. To raise a trust by such purchase, it must have been made at the time with partnership funds, or on partnership responsibility. The payment, incidentally, out of those funds, of an installment due upon an antecedent contract on individual responsibility, can not raise such a trust, or give title to anything but reimbursement. Now, here, the purchase was on individual responsibilities. The parties gave their bonds, which bound each and his heirs for his own part, as between themselves, though both were bound for the whole to the vendor. The payments, therefore, if they had been made with the partnership funds, would not have converted the land into partnership property. But the payments were, in fact, ultimately made by Wheatley himself, whose right to reimbursement rests on principles wholly different.

This brings us to the second point; and here, I think it clear, that the deed of trust of Wheatley and Calhoun to Roberts of March, 1824, was paramount to the widow's right of dower. Though it does not appear to have been executed at the same time with the deed of conveyance to them, yet it was so contracted for, and the two instruments must therefore, in equity, be regarded as parts of the same transaction: *Gilliam v. Moore*, 4 Leigh, 30 [24 Am. Dec. 704]. The dower right of the wife must, therefore, be subordinate to the deed of trust.

Next, it is to be seen whether that deed of trust is yet in force. It would seem to be so in the strictest sense, for the whole purchase money has not even yet been paid. But even if it had been, I should be clearly of opinion, that it was kept alive for the benefit of Wheatley, so far as he has made payments beyond his just proportion of the debt. Admitting (what I am not yet disposed to concede) that when a surety pays off a bond, there is nothing to which he can be substituted, as the security is gone, yet the same inference can not be drawn in relation to a deed of trust. If the surety for the debt has paid it, still the title is outstanding in the trustee, and is in the power of a court

of equity, which will apply it to his indemnification. The technical objection that the remedy is gone, and there is nothing to assign, can not prevail; and the court will act upon the conscience of the trustee, and compel him to execute the trust for the benefit of him who stands in the shoes of the creditor.

Had the sale, then, been under the first deed of trust of March, 1824, there would, I think, be an end of the case. But it was not; and of course, the equity of redemption under that deed has never been foreclosed, as to any rights of the widow. She was, without question, entitled to dower in that equity of redemption, to the extent to which her husband Calhoun had made payment of his proportion of the purchase money. In other words, if upon a sale, there should be an excess over and above the debt secured, that excess, being the measure of the equity of redemption, would belong to Calhoun and Wheatley, in the proportions in which they have paid the purchase money, and Calhoun's widow would have her dower in her husband's portion.

With this view of the case, I am of opinion, that if Mrs. Calhoun shall ask a resale of the trust property, she will be entitled to it; and if there be an excess over and above the purchase money, she will be entitled to her dower interest out of Calhoun's portion of it. In the event of such claim being asserted, accounts should be directed to ascertain what proportion of the purchase money has been paid by Calhoun, what out of the partnership funds, and what by Wheatley, it being obvious, I think, that Wheatley, if he has overpaid, is entitled, by substitution, to resort to the deed of trust for reimbursement.

The other judges concurred.

The decree of this court declared, that on the joint purchase by Wheatley and Calhoun of the New Mills and two hundred acres of land, a contingent right of dower in a moiety thereof accrued to the wife of Calhoun, subordinate, however, and subject to the lien for the purchase money; and had that lien been discharged by the payment, by the purchasers respectively, of moieties of the purchase money, the dower right would have prevailed over any claim of the surviving partner for a general balance on the settlement of the partnership accounts. That the lien for the purchase money being an express term of the contract of purchase, was paramount to the claim of dower, the efficacy of which lien in overreaching the dower right, was in no degree impaired by the delay in executing the deed of trust,

whereby the purchase money was stipulated to be secured; and that deed being executed in fulfillment of one of the stipulations of the contract, has, in respect to the dower right in question, the same effect in equity, to all intents, as if executed *uno flatu* with the conveyance to Wheatley and Calhoun. That so far as either of the joint purchasers, Wheatley or Calhoun, shall have paid more than a moiety of the purchase money, or so far as the purchase money may have been paid by the partnership of Wheatley & Calhoun, the deed of trust to secure the purchase money stands as a security for the partner or the partnership; and the partner, or the partnership, is entitled to be subrogated thereto, for reimbursement; and to these rights, so far as Wheatley is interested in them, the dower right is subordinate; so that it attaches only to one moiety of the surplus after satisfying the claim of Wheatley for payment of the purchase money made by himself, or by the partnership of Wheatley & Calhoun. That this claim of dower in property of the nature of an equity of redemption, has not been foreclosed by the sale under the deed of trust of May, 1830, to indemnify the indorsers of the notes of Wheatley & Calhoun, which were originally given to provide the means of paying the latter installments of the original purchase money; and the appellee has still the right to have a resale, should she think proper to claim it, and to have dower of the moiety of excess of the sum produced by such resale, above the amount which, on the taking of the proper accounts, may appear to be necessary to discharge the claims of Wheatley for the payments on account of the purchase money, made by himself or the partnership of Wheatley & Calhoun. And that the appellee is not entitled to dower in the two hundred and twenty-one acres of land her husband contracted to purchase of Wheatley by the articles of October, 1822, the contract therefor never having been carried into effect, and the same having been rescinded and abandoned, while it was yet wholly executory, and before the payment of the purchase money was completed, or the legal or equitable possession or seisin of the land acquired by the purchaser. And that the decree of the circuit superior court was erroneous. Therefore, it was reversed with costs, etc. And the cause was remanded for further proceedings to be had therein according to the principles above declared; and in case the appellee should not, within a reasonable time, choose to assert her claim to dower on those principles, and to that end, ask a reference to a commissioner to take the proper accounts, then her bill to be dismissed, but without costs.

PARTNERSHIP INTERESTS IN REALTY: The law of partnership does not apply to realty: *Coles v. Coles*, 8 Am. Dec. 231; partners are tenants in common of land: *Baker v. Wheeler*, 24 Id. 66; the title to real estate bought with partnership funds, vests in the separate partners as joint owners, and any one may sell his undivided share: *Baca v. Ramos*, 29 Id. 463. Real estate can only become partnership property by deed, or other writing properly recorded, indicating an intention to make it such: *Hale v. Henrie*, 27 Id. 289.

WIDOW NOT ENTITLED TO DOWER WHERE HUSBAND MORTGAGES LAND or conveys it to trustees to secure the purchase money: *Holbrook v. Finney*, 3 Am. Dec. 243; *Bird v. Gardner*, 6 Id. 137; *Stow v. Tift*, 8 Id. 266; *McCauley v. Grimes*, 20 Id. 434; *Gilliam v. Moore*, 24 Id. 704.

HANSBROUGH'S EXECUTORS v. HOOE.

[12 LEIGH, 316.]

LEGACY IS ADEEMED WHEN the parent, who gives the legacy afterwards upon the child's marriage, makes an advance to her in the nature of a portion.

DOCTRINE OF ADEPTION APPLIES TO BEQUESTS OF REALTY as well as to bequests of personalty (TUCKER, P., dissenting).

DEVISE OF REALTY IS ADEEMED WHEN the testator on the marriage of the devisee advanced her another equally large tract of land as a portion (TUCKER, P., dissenting).

PETER HANSBROUGH bequeathed to his granddaughter, Maria Hansbrough, certain negroes and personal property, and a sixth of a large tract of land. Maria was about to be married to Hooe, and he (Hooe) proposed to the testator that he settle certain property, consisting of negroes and land, upon Maria and her children. The testator at first refused, saying he had sufficiently provided for her in his will, at the same time reading it. After some persuasion, however, he agreed to settle on her another tract of land, large as the one she would have taken under the will, several negroes, and a sum of money. The testator died, and his executors executed the agreement for marriage settlement. The bill was exhibited in the superior court of chancery of Fredericksburg, and thence removed to the circuit superior court of Spottsylvania by Hooe and Maria, his wife, against the representatives of Peter Hansbrough to recover the property bequeathed Maria by the will. The court held that the legacies of personalty were adeemed, but that she was entitled to her share of the real estate, and decreed accordingly; from which decree defendants appealed.

Leigh, for the appellants.

Patton, contra.

CABELL, J. The question in this case is, whether the legacies and devises given by the will of Peter Hansbrough to his granddaughter, Maria Hansbrough (now Mrs. Hooe), were revoked, adeemed, or satisfied, by the subsequent advancement in real and personal property, made to her by him, on her marriage to Mr. Hooe. The doctrine upon this subject, so far as relates to legacies, was very concisely, but lucidly laid down by Lord Eldon in *Trimmer v. Bayne*, 7 Ves. 508. He says: "The rule is settled, that where a parent, or person in *loco parentis*, gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other." This rule was fully considered, recognized, and acted on by this court in the case of *Jones v. Mason*, 5 Rand. 577 [16 Am. Dec. 761.] I am clearly of opinion, that this rule is applicable to, and is decisive of, this case, so far as respects the legacies of slaves and other personal property; and consequently, that the decree as to those subjects is correct.

The question, whether the devises of real estate, also, were revoked, adeemed, or satisfied, by the subsequent advancement, is attended with more difficulty. After much reflection, however, I have come to the conclusion, that this question, likewise, is to be determined in the affirmative.

It is said that no case has occurred in which the doctrine of the ademption of legacies has been extended to devises of real estate. This is true. But it is equally true, that there is no case, in Virginia at least, deciding that the doctrine is inapplicable to such devises. The question is now fairly presented, for the first time, and we must meet it. The novelty of a question is well calculated to inspire caution and circumspection, but is not sufficient to control our judgment. New cases are perpetually occurring; but they can be correctly decided, only by the application of old and well-established principles. The case of *Jones v. Mason* was a new one: nothing like it could have occurred in England; nor had such case ever been presented to our own courts. It was there decided, for the first time, that a specific legacy of slaves, given as a portion, was adeemed, in part, by a subsequent advancement of other slaves, made and intended by the testator, in lieu of certain of his slaves given by the will. It was thus decided, because, according to the practice in our country, it had become common for parents to provide portions for their children by a bequest of slaves, and because it was, on principle,

as just and proper that such portions should be adeemed and satisfied by a subsequent advance of other slaves in lieu thereof, as if the portion provided by the will, and that provided by the subsequent advancement, had both consisted of money. It seems to me, that this principle is quite as applicable, in this country, to a portion by will consisting of lands; for it is well known, that it is almost as common to provide portions for children by a devise of lands, as to provide them by a bequest of slaves; and, as far as my observation has extended, it is more common to provide them in lands, than in money: whereas, in England, it is very rare that younger children are advanced otherwise than in money. Our legislature has, in many cases, manifested a disposition to break down the distinction, which formerly existed, between real and personal estate. Thus, in case of intestacy, the real and personal estate will, with a very few exceptions, go to the same persons; and an advancement of real estate is to be brought into hotchpot in the distribution of personalty, and an advancement of personalty is to be brought into hotchpot in the division of the real estate.

It seems to me, that in relation to the subject now before us, the nature of the estate given, whether real or personal, is a matter of no consequence. The object for which it is given, is the thing to be attended to. If it be given as a portion for the child, whether it be realty or personalty, it ought to be adeemed by a subsequent advancement made by the parent in lieu of the legacy. Now, in the case before us, it is impossible to look at the facts, and not to see that the legacies and devises in the will were intended as a portion; and it is equally impossible not to see that the provision by the advancement, on the marriage, was intended by Mr. Hansbrough to be in lieu of, and not in addition to, the provision made by the will. What is to prevent us from applying to this case the same principle of equity that was applied in the case of *Jones v. Mason*? I hope I have shown, that there is nothing in the objection as to the novelty of the case. It is contended for the appellees, that our hands are tied up by our statute concerning wills, which, after prescribing the manner in which a will of lands shall be made, declares, that "no devise so made, or any clause thereof, shall be revocable but by the testator or testatrix destroying, canceling, or obliterating the same, or causing it to be done in his presence, or by a subsequent will, codicil, or declaration in writing, made as aforesaid." But, as Judge Green observed, in *Jones v. Mason*, this clause is the same in effect with the clause in the

statute of 1748, which was taken from the twenty-second section of the English statute of frauds, 29, c. 2, and which provides, that "no will in writing, or any devise therein of chattels, shall be revoked by a subsequent will, codicil, or declaration, unless the same be in writing." The statute of frauds, however, has never been held, in England, to prohibit the revocation, either of wills of land or of personalty, by implications founded on events subsequent to the making of the will. And in the case of *Wilcox v. Rootes*, 1 Wash. 140, it was expressly decided, that the subsequent marriage of the father, and the birth of a child, was an implied revocation of a will, even at law, both as to real and personal estate. I see no objection to extending the principle, at least in equity, to an implied revocation by a subsequent advancement, made and intended by the testator in lieu of the provision made by the will. The fact that a legatee of personal property can recover his legacy only in a court of equity, while a devisee of lands, taking the legal title, may recover in a court at law, seems to me to make no material difference in the case. It very often happens, that the legal title is in one person, while the equitable is in another; and, in such cases, it is competent to a court of equity to prevent the assertion, or enforce the surrender, of the legal title.

I am of opinion to reverse the decree, so far as it purports or intends to give to the appellees any portion of the real estate; and to dismiss the bill.

BROOKE, J., concurred.

TUCKER, P. If there can be a case in which a grandfather can place himself *in loco parentis* in relation to his grandchildren, of which there is no reasonable doubt, this is such a case. John Hansbrough, the son of the testator, being dead, his children are taken into the family of the grandfather and receive their nurture and education from him; and by his will, he places them in the position of children, by devises and bequests of real and personal property to be divided among them and his sons and daughters, giving them the share of their deceased father. The bequests to them are not of independent and substantive legacies, which might be deemed an emanation from his mere bounty; but it is a partition among his living children and the children of a deceased son, of his entire estate. For although some of the clauses of the will contain devises and bequests of distinct and separate property to be divided among them, yet there are others, in which other portions of the estate are given to the children and grandchildren together, to be divided equally

amongst them, except that the grandchildren are to take the portion of their father. And the whole will, taken together, shows very distinctly that it was the testator's design that his grandchildren should have what his son John would have had. He has thus placed them *in loco filiorum*, and by consequence places himself *in loco parentis*.

I am not less satisfied that the intention of Peter Hansbrough, the testator, was that the settlement made upon the marriage of his granddaughter Maria should be a satisfaction of what he had given her by his will. He did not design a double portion for her. The peremptory style of Mr. Hooe's communication was in no wise calculated to conciliate the grandfather, and to induce him to give to this daughter of his son John twice as much as to her brothers and sisters. The facts proved establish the refusal in the first instance, and the reluctance throughout, of the testator, to enter into the marriage agreement. He produced his will and insisted on its provisions as being sufficient. But the matter was pressed upon him, and he at length assented. We see in this no evidence of a disposition to add to what he had given by the will. On the contrary, as I understand the transaction, he on his part was unwilling to bind himself by contract to do that which he had already done by his will, and thus to take from himself that power of revocation which the circumstances of the case or his own natural disposition might have made it desirable to retain. Mr. Hooe, on the other hand, was probably unwilling to subject himself to the caprices of the old man, and may have been desirous to make the advancement (which seems to have been a *sine qua non*) as irrevocable as the marriage tie, by which he was to be indissolubly bound. This, I take it, was the real matter of difference; nor does there appear to be the least reason for believing that either of the parties thought of the provisions of the settlement being cumulative, instead of a mere substitute for the provisions of the will.

Now, it is an established principle, that when a parent, or person *in loco parentis*, gives a legacy as a provision, and afterwards upon marriage, or upon any other occasion calling for it, he makes an advance in the nature of a portion to that child, that will amount to an ademption of the gift by will: *Trimmer v. Bayne*, 7 Ves. 508; *Monck v. Monck*, 1 Ball. & B. 298. Was the marriage settlement, as it is called, such an ademption? The court below considered it as such, as to the whole of the provisions of the will except the land; but it held the devise of the land to be unrevoked by the subsequent contract.

Was the devise of the land revoked or adeemed by the marriage settlement? I concur with the court below, in thinking it was not. It is conceded, that there is no instance in the English books or our own, of such a revocation. A gift or sale of the devised subject is indeed an ademption, because the thing itself is gone. It is taken away by the act of the testator himself, whose power of disposition is not restrained by his will. But the gift of other land can not in like manner operate an ademption, because the land devised is not taken away. It is left for the will to operate upon; and to permit the gift of other land to effect an ademption, would be to construe such gift as evidencing the *animus revocandi*, which the statute has provided shall only be declared by a subsequent will, codicil, or declaration in writing, made in the manner in which a will of lands is required to be made. There are, indeed, two ways by which a devise of lands may be rendered nugatory or may be avoided: either by taking away the subject, so that the will though unrevoked has nothing to operate on; or by revoking the clause, so that, although the subject remains, there is no will to dispose of it. But a gift of other land can not operate to adeem, since the land devised is left for the will to operate on; nor can it operate to revoke, because revocation can only be according to the statute.

It is said, however, that notwithstanding the statute, there may be implied revocations. This can not be denied; but it may be confidently affirmed, that there is no case in which a devise to a child of one tract of land has been held to be impliedly revoked by the gift of another. How far it was legitimate to set up any implied limitation in the teeth of the statute, may not now be questioned. We are bound by adjudications in this respect which we may not disregard. But where no precedent commands us to set the statute at defiance, we should steadfastly adhere to its wise and salutary provisions.

Again, it is said, that by the rules of equity an advance to a portioned legatee is to be taken as satisfaction. But these rules do not extend to the realty. They are rules for the personalty, over which the control of equity is entire. The subjects of legacies and distribution are within its peculiar jurisdiction. The legatee acquires no legal title by the will, and distribution can only be obtained through a court of chancery. That court, accordingly, can make and has made certain rules on this subject, which must now be followed. But the realty devised is not within its grasp. A devise passes the legal title to the devisee, and the question of revocation is for a court of law. Had Hooe

and wife instituted their ejectment for the land devised, no question of their title could have been raised. In vain would the defendants have set up the gift of other land as a revocation of the devise. It could not be pretended to have that operation in a court of law; and it is equally clear that equity must follow the law in deciding the question of revocation.

It seems to be supposed, however, that as the contract in this case is not executed but executory, a specific execution would not be decreed except upon the terms of releasing the interests under the will. Whether this be so or not, it may not in this case perhaps be proper to decide, as the bill is filed not to carry into execution the marriage settlement, but to enforce the rights of the plaintiffs under the will. But if the question were before us, I should hesitate to accede to the proposition. Contracts of marriage can not be regarded as standing upon the ordinary footing of other contracts as to specific execution. When the marriage has taken place, there must be specific execution, unless there be fraud. Unreasonableness or delay, or any of the usual grounds of opposition, would seem inadequate to bar a decree for specific performance when the irreversible execution of it by marriage has once taken place. The parties, by that act, are placed in a situation in which the *status quo ante* has become impossible forever. Specific execution, from the moment of consummation, seems to be inevitable for the purposes of justice. I except, as of course, matters of fraud or of contract. If, for instance, in this case the agreement had been obtained by fraud, or if Hooe and wife had agreed that her rights under the will should be given up in consideration of the settlement, a case would certainly be presented in which a court of equity would compel the necessary releases to effectuate justice. But that can not be in the case as it stands. There is no proof of fraud, whatever we may think of the unusually peremptory requisition of the intended husband. Nor is there any proof that he even knew of the provision by will, and much less that he agreed that one provision should be substituted for the other. Upon what ground, then, could a court of equity take away the settlement rights of Hooe, unless he would relinquish the testamentary rights of Maria Hansbrough in the lands devised to her, when neither she nor her intended husband ever assented to, or so understood, the contract of marriage? There can, I think, be no sound reason for doing so, and if the question was fairly presented by the record, I should incline to decide it in the negative. With these views, I

am of opinion to affirm the decree so far as respects the real estates devised by Hansbrough to the female plaintiff.

We are next to inquire, whether the court erred in declaring the bequests of personal estate to Maria Hansbrough to have been adeemed and satisfied by the marriage contract? And I am of opinion, that in this also the court was right. Upon the argument of the case, I was disposed to think, that as the limitations in the will and in the settlement were somewhat different, an absolute fee being limited to the unborn children in the one case, and a contingent one in the other, there could be no ademption. . But reflection and authority have satisfied me, that if the direct objects of the provision are the same in both, it is not material though there be some variation as to those remotely in contemplation of the party. Thus, as both the provisions are for Maria Hansbrough who was the direct object of them, and as to her do not materially vary, it is immaterial that the provisions differ somewhat as to her unborn children, who were remotely contemplated, and may truly be regarded as mere accessories to herself. The case of *Monck v. Monck* is, in this respect, much stronger than this. There Lord Monck bequeathed to his brother five thousand pounds, the interest to be paid to him during life, and if he married, with power to jointure his wife by an annuity of one hundred and fifty pounds per annum, the principal to go to the issue of the marriage, and in default, etc., over. He afterwards, on his brother's marriage, gave his bond to trustees in the marriage settlement, declaring the uses to be to pay the interest to his brother for life, remainder to his wife for life, the principal to be divided amongst the issue in such shares as the father should appoint. The variance in the provisions was not held sufficient to relieve the case from the general rule. I think, then, there is no difficulty in this case arising out of the variance of the provisions, and there is certainly none as to the adequacy of the settled property to cover all the personal bequests. For though the devise of the land can not be revoked or adeemed by the gift of other land, yet the gift of that other land is an advancement which upon the rules of equity will, if adequate, adeem the personal bequests. Now, there can be no doubt, that the four hundred acres of land and the personal estate in the settlement are of more value than all the personal interests bequeathed to Maria Hansbrough by the will; and if so, they are, including the share in the residue, adeemed by the settlement. As to the doctrine

respecting the residuum, see the cases collected in Hovenden's note 8 to *Wilson v. Piggott*, 2 Ves. jun. 350.

The counsel for the appellants has presented another view of this case, which requires to be noticed. He considers it as falling within the influence of the rule, that no man can be permitted to claim under and against a will. But here the appellees do not claim anything against the will. It is true they claim lands, slaves, money, etc., which were otherwise disposed of by the will. But the testator himself, by his own act, adeemed and revoked that testamentary disposition. From the moment that he made the settlement, so much of the will as had given the settled property to others was annihilated, and the appellees do not assert a claim inconsistent with the will. So that although, so far as respects the personal bequests to them, there is an ademption, yet it is not because they are claiming against the will, but because the testator is conceived to have satisfied those bequests by the marriage settlement in his life-time. If the principle contended for could be applied to gifts in satisfaction of legacies, there could never be a difficulty as to an advancement being intended as a satisfaction or not. In every case, the donee would be compelled to give up the one or the other.

Decree reversed, and bill dismissed.

STANARD and ALLEN, JJ., absent.

ADEPTION OF LEGACIES.—Bouvier defines ademption as “the extinction or withholding of a legacy in consequence of some act of the testator, which though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.” This is accomplished in a variety of ways, the most common being by an alteration or the transferring of the thing itself in the case of specific legacies, or by an advancement which is regarded as a satisfaction thereof in the case of general legacies. The question of ademption arises only when the testator is parent or stands *in loco parentis* to the legatee. “Where testator stands neither in the natural nor assumed relation of parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by subsequent advancements unless the legacy is given for a particular purpose and testator advances money for the same purpose.” Williams on Executors, 1338, and cases cited. In the application of the doctrine of ademption there is a wide distinction between specific and general legacies. In the former, the question depends upon the fact whether the article bequeathed remains as described in the will, and the testator's intention does not figure in the decision; in the latter, the testator's intention is the essence of the doctrine, and the fact sought is, did the testator intend the advancement as a bounty, or was it given in satisfaction of the legacy? We will first consider the doctrine as it is applied to

SPECIFIC LEGACIES.—The ademption of specific legacies occurs when the thing bequeathed is destroyed or disposed of by the testator or so altered

that it is not the article mentioned in the will. It is essential that the article be as described. The courts have always required this, and have always held that any material change in the article renders the legacy a nullity. Thus, after the execution of a will and during the life of the testator, a mortgage executed by B., and therein specifically bequeathed to E. McG., was foreclosed. Upon the foreclosure sale, the mortgaged premises were purchased by S., who executed a new bond to the testator for his debt secured by a new mortgage upon the same premises. The court held that by this change in the security the legacy was adeemed, notwithstanding that after the death of the testator there was found among his papers a memorandum in his own handwriting declaring the S. bond and mortgage to be but a renewal of the B. bond and mortgage, and that it was his intention that it should pass to E. McG. under his will: *Beck v. McGillis*, 9 Barb. 35. The court at page 59 of the opinion, said: "All cases unite in asserting the rule that if a specific legacy do not exist at the death of the testator, it is adeemed. It is a rule which prevails without regard to the intention of the testator or the hardship of the case. In this very case there can be no doubt that the real purpose of the testator will be defeated and the ademption of the legacy will operate as a hardship upon the legatee. But the law is too firmly settled to admit of relaxation, however peculiar or pressing the circumstances. The thing given is gone, and no court is at liberty to substitute a different thing for that which testator had himself given." The only questions of difficulty are where the testator retains the article itself in a modified form; for if the article is sold, destroyed, or lost, the will has nothing to operate upon, and the legacy is *ipso facto* destroyed. A change which leaves the subject-matter substantially the same will not adeem a legacy: *Havens v. Havens*, 1 Sand. Ch. 334; *Ford v. Ford*, 3 Foster, 212; 2 Redf. on Wills, p. 470, sub. 21, and cases cited. If a testator bequeaths stock, the legacy will be adeemed or not, according as the stock has been disposed of or not. And a legacy of stock has been held adeemed though the testator afterwards purchased back an equal amount of the same stock: *Pattison v. Pattison*, 1 My. & K. 12. But in *Partridge v. Partridge*, Cas. T. Talb., where this question arose, Lord Talbot decided the legacy not to be adeemed. "All cases of ademption of legacies," he said, "arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again." And stock is not adeemed where it is converted into a different species by an act of parliament: *Bronsdon v. Winter*, Amb. 57; nor where railway shares were converted into consolidated stock by a resolution of the company under authority of an act of parliament: *Oakes v. Oakes*, 9 Hare, 666; nor where it is transferred to the name of the testator from the names of trustees: *Dingwell v. Askew*, 1 Cox, 427; nor where it is transferred by fraud against the intent or without the knowledge of the testator: *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Basan v. Brandon*, 8 Sim. 171; and mere intention to change or transfer the stock will not adeem the legacy, unless the intention is carried into effect: *Basan v. Brandon*, 8 Sim. 171; *Patton v. Patton*, 2 Jones' Eq. 494; *Harrison v. Asher*, 2 De G. & Sm. 436.

If goods in a particular locality are removed, their removal will work an ademption of the legacy. Thus where the testator specifically bequeathed all the furniture in a certain house, and afterwards moved the furniture into another house, the legacy was adeemed: *Heseltine v. Heseltine*, 3 Madd. 276; *Spencer v. Spencer*, 21 Bea. 548; so also if after bequeathing to C. all the books at his chambers in the temple, the testator remove the books: *Green v. Symonds*, 1 Bro. C. C. 129, n. And that the removal was on account of the

expiration of a lease makes no difference: *Colleton v. Garth*, 6 Sim. 19. But in *Blagrove v. Core*, 27 Beav. 138, a testator directed his furniture in Gloucester square to be applied in payment of his debts, and in a subsequent part of his will he bequeathed his furniture in England to his sisters. The testator afterwards removed the furniture in Gloucester square to another residence; the court held that this removal was not an ademption, and did not pass the furniture to the testator's sisters. And a mere temporary or accidental removal will not work an ademption: *Land v. Devaynes*, 4 Bro. C. C. 537, where a testator bequeathed all his plate in the house of S. to his wife, and he had but one set of plate, which was usually removed with his family from house to house. And under a bequest of household furniture, pictures, and books, which might be, at the testator's decease, in, upon, or about his mansion, the court held that pictures removed from the mansion and in the hands of a picture-cleaner to be cleaned, and books sent to be repaired, passed, but not articles purchased for the mansion but not sent home at the testator's decease: *Lord Brooke v. Earl of Warwick*, 2 De G. & Sm. 425. And "removal of goods for a necessary purpose, is not an ademption of a specific legacy," per Lord Thurlow, in *Moore v. Moore*, 1 Bro. C. C. 127. Nor a removal on account of fire: *Chapman v. Hart*, 1 Ves. 271; for in such a case, said Lord Hardwicke, "they should be considered as being in the testator's house at his death, and the legacy is not defeated by that accident." And where a tenant for life wrongfully disposed of plate which testator was absolutely entitled to in remainder and which he had specifically bequeathed, the legatee was held entitled to the produce of the sale: *Domville v. Taylor*, 32 Beav. 604.

The doctrine of ademption also applies to specific legacies of debts. "Upon the whole, it may be considered as the settled rule of the court of chancery, that under whatever circumstances the debt specifically bequeathed is received by the testator, an ademption will be effected, upon the principle before stated, that the subject is annihilated, and nothing remains upon which the terms of the bequest can operate:" 1 Roper on Legacies, 337, and cases cited; *Rider v. Wager*, 2 P. Wms. 329; *Badrich v. Stevens*, 3 Bro. C. C. 431; *Cuthbert v. Cuthbert*, 3 Yeates, 486; *Ludlam's Estate*, 1 Parson's Eq. 116. But there must be an actual payment and a mere change in the form of the security, or a substitution of one security for another is not an ademption: *Stout v. Hart*, 2 Halst. 418; *Ford v. Ford*, 3 Fost. (N. H.) 212; *Davis v. Maynard*, 9 Mass. 242; *Pomeroy v. Rice*, 16 Pick. 22; *Dunham v. Dey*, 15 Johns. 554; *Bank v. Willard*, 10 N. H. 210. Thus, in *Ford v. Ford*, 3 Fost. 212, the testator bequeathed all notes which were due him at the date of the will. The testator then held four notes with a third party as surety, but subsequently surrendered them and discharged the surety, and took four notes from the principal, secured by a mortgage. The court held that as the change of form did not impair the identity of the fund there was no ademption. And in *Gardner v. Printup*, 2 Barb. 83, a mortgagor, the mortgagee, and a purchaser of the mortgaged premises, entered into an agreement that the mortgagor should be credited with the whole of the purchase money on the payment of part, and the execution by the purchaser of a bond for the residue, and the court held that a bequest "of the proceeds" of the mortgage was adeemed only to the extent of the sum actually received, and that the legatee was entitled to the amount remaining due and unpaid.

A specific legacy is not adeemed by the testator's pawning or pledging it: *Ashburner v. Macguire*, 2 Bro. C. C. 108; *Knight v. Davis*, 3 My. & K. 358. In the latter case the master of the rolls said: "Where a specific legacy is pledged by the testator, the specific legatee is entitled to have his specific

legacy redeemed; and if the executor fail to perform that duty, the specific legatee is entitled to compensation, to the amount of the legacy against the general assets of the testator." And a renewal of articles of partnership will have no effect on a specific legacy. Thus, where one partner by his will gives one ninth of one twelfth of the profits reserved to him to his partners. He afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles, and the court held they were entitled to one ninth of the testator's interest in the partnership at the time of his death, and that the renewal of the articles did not work an ademption: *Blackwell v. Child*, Amb. 260.

Where a testator devises a leasehold estate held under a college, and afterwards renews the lease, the new lease does not pass by the will: *Hone v. Medcraft*, 1 Bro. C. C. 261; and the same principle was laid down in *Sir Thomas Abney v. Miller*, 2 Atk. 593; *Rudstone v. Anderson*, 2 Ves. sen. 418; and *Slatter v. Noton*, 16 Ves. 197; and so where a testator having bequeathed leaseholds assigns them upon other trusts: *Cowper v. Mantel*, 22 Beav. 223.

ADEPTION OF GENERAL LEGACIES.—The ademption of general legacies occurs most frequently where the parent makes an advancement to the child by way of marriage settlement or otherwise, and the presumption is that any such advancement is to be in lieu of the legacy. In *Pym v. Lockyer*, 5 My. & Cr. 29, the rule is well stated by Lord Cottenham. He says: "All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitute for, and not as an addition to that first given; but when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts." See also Story's Eq. Jur., sec. 1111 *et seq.*; 2 Redfield on Wills, 440; 2 Williams on Ex'rs, 1439 *et seq.*, and the cases cited by these authors. But where a father, by his will, gave his son five hundred pounds, and afterwards takes him into partnership, the stock being worth three thousand pounds, this was held not an ademption of the legacy, as it was not *ejusdem generis*: *Holmes v. Holmes*, 1 Bro. C. C. 555. And that an advancement must be *ejusdem generis* was held in *Davys v. Boucher*, 3 Y. & Coll. 397; and a residuary bequest is not adeemed by an advancement, as a gift of a residue is not a gift of a portion: *Freemantle v. Banks*, 5 Ves. 79; and where the advancement is dependent upon a contingency, it will not adeem a legacy of certain amount: *Spinks v. Robins*, 2 Atk. 491; and a portion paid absolutely to the husband upon his giving up a certain interest of his wife, is not an ademption of a legacy to the wife: *Baugh v. Read*, 1 Ves. jun. 257. However, in the absence of any peculiar circumstances, and of evidence of the testator's intent, the advancement is always regarded as an ademption. This presumption is not conclusive; on the contrary, as the question is always one of intent on the part of the testator, evidence is admissible to show whether the advancement was to be in lieu of the legacy, or was intended merely as a gift and as additional to it. The question as to the admissibility of parol evidence to explain the intent of the testator, was discussed by Redfield, in his able treatise on wills: 2 Redfield on Wills, 442 *et seq.*; and he says: "The conclusion to which we feel compelled to come is, that, upon strict principle, the admission of this class of proof is reduced to very narrow limits, but that in practice it has taken a much wider range."

DEMONSTRATIVE LEGACIES, ADEMPMENT OF.—The doctrine of ademption does not apply to demonstrative legacies, that is, to those which point out a particular fund from which the legacy is to be paid; if the fund does not exist at the testator's death, the legacy is still entitled to be paid from the general assets: 2 Redfield on Wills, 137; Williams on Executors, 1320; *Giddings v. Seward*, 16 N. Y. 385; *Pierrepoint v. Edwards*, 25 Id. 128; *Armstrong's Appeal*, 63 Pa. St. 312. "There is no doubt that, where a testator bequeaths a sum of money in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund:" *Per Wigram, V. C.*, in *Dickin v. Edwards*, 4 Hare, 276; and that principle was laid down at an early date by Maccolesfield, Lord Chancellor, in *Savile v. Blacket*, 1 P. Wms. 777, where he said, "if a legacy was given to J. S., to be paid out of such a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failing of the *modus* appointed for payment should not defeat the legacy itself."

DOANE v. KEATING.

[12 LEIGH, 391.]

GOODS STOWED ON DECK AND LOST BY JETTISON are not entitled to general average; and this rule applies to cases where goods are stowed on the decks of coasting vessels.

KEATING shipped some molasses for Norfolk on the schooner *Empire*. The bill of lading was in the usual form, and did not mention that the shipment was of a deck load. The molasses was stowed on deck. After the schooner sailed, a violent storm came on, to weather which it became necessary to throw overboard most of the molasses. This was accordingly done, the storm was weathered, and the vessel arrived in Norfolk and discharged her cargo. Keating brought this suit against Doane and others, the owners. Evidence was offered to show that the load was stowed on deck at the earnest request of Keating, and that the owners took it with reluctance. Keating showed that the vessel was employed in the coasting trade, was constructed to carry such loads, and was in the habit of carrying them. The court held the loss to be the subject of general average, and held the owners liable for the whole amount of the contribution, as they had discharged the cargo, leaving them to their remedy against the individual shippers. Defendants appealed.

Robinson, for the appellants.

Lyons and Stanard, contra.

ALLEN, J. The first inquiry presented by this case is, whether

it was competent for the defendants below, to set up and rely upon the defense, that the goods in question were shipped on deck with the knowledge of the plaintiff, and therefore excluded from the benefit of general average. To admit any evidence to establish such facts, would, it is contended, be to contradict the terms of the bill of lading, the written contract between the parties. I do not deem it important to enter into a critical examination of the contract, to ascertain whether such evidence would or would not be consistent with the bill of lading. The perils of the sea are excepted; that the loss was incurred in consequence of those perils, is fully made out; and the only ground upon which Keating can rest, is the claim to general average. According to the maritime law, all who have been benefited by the loss of one, are bound to contribute to make it good, provided it is a proper case for general average. If Keating had proceeded against the ship-owners for their misconduct in placing on deck the twenty hogsheads named in the bill of lading, without authority, it might then have become material to examine how far the evidence objected to conflicts with the written instrument. The ship-owner is held responsible for all the contributory shares of those interested in the cargo, because the case is supposed to fall within the principle of general average, and the cargo was delivered to the several owners thereof, without their having been required to contribute. If the ship-owner should be held primarily liable on this ground, he would have a right to recover from the various shippers their contributory shares; and unless the objection to the testimony would avail, if offered in defense to a bill against them for contribution, it ought not to avail here. Their liability results from the general principles of maritime law, and does not depend on any special contract with master or owner. Keating does not found his claim upon the bill of lading: he seeks to recover for the failure to deliver twenty-three hogsheads; the bill of lading mentions but twenty. The court below held it a proper case for general average, and rendered a decree for the amount, to which, upon the principles of general average, Keating was entitled.

By the maritime law, the loss by general average is to be adjusted at the place, and according to the law of the port of discharge: *Simonds and Loder v. White*. With this agrees the Ordinance of Marine, liv. 3, tit. 8, art. 6. And Valin, tom. 2, p. 192, shows, that the laws of the Rhodians were the same. Norfolk being the port of discharge, the laws of Virginia must govern. On this subject, our statutes and reports are silent.

Nor have we, in this case, any proof of general usage. The case being entirely new, we must resort to the general maritime law, and take that rule which seems to have received the sanction of most commercial nations.

The rule of the Rhodian law, as found in Abbott on Shipping, is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all." But goods stowed upon deck are excluded from this benefit. The French ordinance also excludes them. And so far as the matter has been acted upon in the courts of this country, the same rule has been adopted: 3 Kent's Com. 240, and the cases there cited. This being the general rule, is there anything in this case to make it an exception? It was contended in argument, that the general rule should not apply, because the vessel was employed in the coasting trade, constructed for the purpose of taking freight on deck, and that it is known to all who ship on such vessels, that such is the usage; from which it is inferred that all should be liable for contribution in case of jettison. To sustain this view, an expression in *Smith v. Wright* is relied on: it is there stated, "that shippers on deck are not entitled to general average; that the shippers of goods under hatches, and the insurers on ship and cargo, are not liable to contribution, on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation." If this were the true reason of the rule, there would be great force in the argument. Shippers under hatches could not claim the benefit of a principle, founded on their presumed ignorance of a fact, when it clearly appeared they were fully apprised of it. But this can not be the true reason; for the ship-owner is entitled to contribution for damage sustained by the vessel, to save her in a case of extremity; which could not be, if the rule were founded on the reason above mentioned. The master or owner can not be ignorant that the goods are shipped on deck. The true reason why contribution can not be claimed for goods shipped on deck, is given in a note to the case referred to: "The goods themselves increase the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed if it be necessary to eject." It is a penalty imposed on the shipper, who thus puts to hazard the safety of the ship and the lives of the crew. And this is the reason given by Valin, tom. 2, p. 203: "The reason why payment for effects on deck thrown overboard or damaged, is refused by this article, is, that they serve only to embarrass the working of

the ship; the presumption is, that they have been thrown overboard, before an absolute necessity for jettison, and solely because they hinder and obstruct the working." If I have a proper understanding of the sense of the original, the jettison of goods on deck is justified under circumstances which would not authorize the same course with goods under hatches: so I understand the phrase, *la presumption est qu'ils auront été jetés avant toute nécessité de jet*. And there is good reason for it; with the loading under hatches and the decks clear, so that proper exertions could be made for her safety, the vessel would ride out a storm securely, which, with her decks incumbered with loading, would endanger her safety. Such being the true reason of the rule, the usage of vessels engaged in the coasting trade to take on deck loads (even if proved, which it is not in this record), and the knowledge of that fact by the other shippers, would not vary the rule. Accordingly, some of the cases referred to in the American reports were cases of coasting vessels.

It was further argued, that the general rule should not apply to coasting vessels, upon the authority of Valin, tom. 2, p. 205, where it is said, contribution may be claimed for goods thrown overboard from the deck of small coasting vessels or river craft, which usually carry a part of their cargoes on deck, to which Phillips on Ins. 832, refers, as supporting the position that the usage of trade may control the general rule. The instances put by Valin are of a very limited navigation, between ports in the immediate neighborhood of each other, and where it was scarcely necessary to venture into the open sea. In such cases, but little if any difference is made in freight, so inconsiderable is the risk; and the master has the right, under the usage, to stow the cargo as he pleases. A benefit results to all the shippers in consequence; for no difference being made, the freight chargeable to all is reduced; and therefore as all are benefited, all should contribute. But no such reason can apply to the case, where the master has no such right, and is only authorized to load on deck by special contract with the shipper. The instance referred to by Phillips, of the practice in whaling voyages to adjust, upon principles of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold, would seem to be founded on the same principle. All are benefited equally. If the oil can not be stowed safely until it remains some time on deck after being put into casks, each adventurer is exposed to the same peril; the exposure

is for the benefit of all interested in cargo and ship; and therefore, according to the principles of equal and exact justice which seem to pervade this branch of maritime law, all should contribute. But, in the case of coasting vessels on our coast, no benefit by the reduction of freight, or in any other way, accrues to the shipper under hatches, from taking on a deck load. The navigation is, on the open sea, rendered frequently more perilous from proximity to the shore, than navigation across the ocean.

I am therefore of opinion that this case does not fall within any of the exceptions to the general rule, and that Keating was not entitled to claim general average.

This view of the main question sepersedes the necessity of inquiring whether the action can be maintained against the ship-owner alone, if, in a case where general average can be claimed, he surrenders the cargo to the several shippers without collecting the contribution or taking from them any security.

I think the decree should be reversed and the bill dismissed.

STANARD, J. Passing by the objections to the recovery founded on the suggested discrepancy between the claim asserted in the bill and that for which the decree was rendered; passing by, too, the objection that Keating could not maintain his claim against the ship-owners alone, for the whole amount which ought to have been contributed by them and the owners of the cargo; two questions arise on the merits of the claim: 1. Were Keating's goods shipped on deck in conformity with the contract of affreightment? And, 2. If they were, and have been lost by a justifiable jettison of them, are the shippers of them entitled to the benefit of general average? The evidence, if it be admissible, is full and satisfactory, that the goods were shipped as a deck load; and there is no doubt that the jettison was justifiable under the circumstances. It is, however, objected, that the evidence to prove that the goods were shipped as a deck load, is inconsistent with, or explanatory of, the bill of lading, and that such evidence is inadmissible. The evidence is not, in my opinion, inconsistent with the bill of lading. That neither affirms nor disaffirms that the goods were shipped as a deck load; and my impression is, that the utmost it can avail the shipper, is to cast on the ship-owner the burden of proof, that the stowing of the goods on deck was justifiable. But furthermore, if the bill of lading was of more efficacy, clear extrinsic proof, that it was signed by mistake, and that the actual agreement was, that the goods should be taken and stowed on

deck, would be admissible; and such proof being offered would repel the claim founded on a paper so signed. It would be but the common case of a mistake committed in reducing an agreement to writing; a mistake, from which a court of equity would relieve, even if the party were asking its aid for the purpose; *a fortiori* would the court withhold its aid to enforce such contract according to its letter, in disregard of the proof of the mistake.

The general rule of the maritime law seems to be well established, that goods stowed on deck and lost by jettison, are not entitled to general average: Abbott on Ship. 345; 3 Kent's Com. 240; Valin, tom. 2, p. 303, to which may be added the cases of *Smith v. Wright*, in New York, *Dodge v. Bartol*, in New Hampshire, *Barber v. Brace*, in Connecticut, and *The Brig Thaddeus*, in Louisiana. And there are no decisions bringing the general rule in question. The exception which seems to prevail in some of the coasting trade of France, does not apply in this case. No such exception is admitted in respect to the coasting trade of England; and the cases before referred to show, that it has not been admitted by the judicial decisions of other states of the union in respect to the coasting trade of the United States. The kind of lading and navigation, in which the exception is allowed in France, differs essentially from the lading and navigation of our coasting trade. In the former, no distinction is made in the freight, and the master, under the usage, has the discretion to put any part of the lading on deck which he thinks proper, without special contract and without incurring any responsibility for so doing. Our coasting trade navigates hundreds of miles in the main ocean, and is exposed to all sea risks.

I concur, that the decree is to be reversed and the bill dismissed.

CABELL, J., concurred.

Decree reversed, and bill dismissed.

BROOKE, J., absent.

GOODS STOWED ON DECK ARE NOT A SUBJECT OF GENERAL AVERAGE: *Smith v. Wright*, 2 Am. Dec. 126; *Dodge v. Bartol*, 17 Id. 233; *Oram v. Aiken*, 29 Id. 503. The principal case was referred to with approval in *Sturges v. Cary*, 2 Curt. 68.

HICKS v. GOODE.

[12 LEIGH, 479.]

WHERE DEED IS SEALED AND DELIVERED AS AN ESCROW to the party himself to whom it is made, but to become the deed of him who sealed it on certain conditions, the delivery is absolute, and the deed shall take effect presently as his deed, and the party is not bound to perform the conditions.

IDEM—WHERE DEED ON ITS FACE IS NOT COMPLETE, but requires some further act to execute it, delivery of it to the party to whom it is to be made is not absolute, and it remains in his hands subject to the performance of the act.

DEED in the circuit superior court of Mecklenburg, by Hicks and others against Goode, on a bond. Goode pleaded that he delivered the bond to Harrison, one of the obligees, as an escrow, the bond to be of no effect unless signed by one Jones, who was to execute the bond jointly with him; and that Jones had never signed the bond, and consequently the bond was void. The form of the bond sufficiently appears from the opinion. Verdict for Goode. Plaintiffs moved for a new trial, which the court refused. Plaintiffs did not file exceptions to the refusal. Judgment was then given on the verdict. and this court allowed a *supersedeas* to the judgment.

Macfarland and Rhodes, for the plaintiffs.

Lyons and Stanard, contra.

CABELL, J. I am not disposed to controvert the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger. While it is universally conceded, that where a deed is sealed and delivered to a stranger, as an escrow, until certain conditions are performed, and then to be delivered to him to whom the deed is made, to take effect as the deed of him who sealed it, such deed, even although the other party get it into his possession, is as inoperative, until the conditions are performed, as if it had never been delivered at all; yet it seems to be settled also, that if a deed be sealed and delivered to the party himself to whom it is made, as an escrow, but to become the deed of him who sealed it on certain conditions, in such case, let the form of the words be what it may, the delivery is absolute, and the deed shall take effect presently as his deed, and the party is not bound to perform the conditions: Co. Lit. 36 a; Shep. Touch. 58, 59. The reason assigned by Coke is, that "the delivery is sufficient without speaking of any words (otherwise a man that is mute could not

deliver a deed) and tradition is only requisite; and then when the words are contrary to the act which is the delivery, the words are of none effect;" for "*non quod dictum est, sed quod factum est, inspicitur.*" In the case of *Williams v. Green*, Cro. Eliz. 884, the reason assigned by the court is, that if it were allowed, "a bare averment, without any writing, would make void every deed." As already observed, I shall not controvert the propriety of this distinction. But I must say, that the reasoning on which it is founded, is not only very technical, but it is unsatisfactory to my mind; for it is not every tradition, or passing of a deed from the hands of one to the hands of another, that will constitute a legal delivery of it as a deed. Something at least is due to the intention with which the tradition is made; and such intention, on such an occasion, is generally gathered from our words, rather than from our actions. Therefore, I am not disposed to carry the doctrine farther than it has already been carried by the adjudged cases.

I have not observed a single case in which the doctrine has been applied to any deed which was not, on its face, perfect and complete, requiring nothing to be done to give it full efficacy as a deed according to the intention of the parties, but the mere delivery of it as a deed. This is necessarily the case, where the tradition is to the party himself; for, in such case, the instrument becomes, by the mere tradition, *ipso facto*, the present deed of the party; which could not be, if the deed were not in itself perfect and complete as an instrument, according to the intention of the parties, as gathered from the instrument itself. All the cases will accordingly be found to relate to conditions extrinsic and *dehors* the deed. Let these principles be applied to this case.

The deed on which this suit is brought, commences, "We, John C. Goode and Benjamin B. Jones, are held and firmly bound, etc., in the just and full sum, etc., on or before," etc., and concludes "witness our hands and seals," etc. Then comes the signature of Goode, with a seal annexed; and under it, where the name of the other obligor ought to be, there is a seal, but no signature: and it is attested "J. Rice, as to J. C. Goode." Can anything be more manifest than that this deed was not intended to be the several deed of Goode? Is it not clear, that it was not intended to be even his joint and several deed? It is purely and merely joint; importing a joint obligation with Jones—and this was the intention of all the parties to the deed, at the time Goode signed and sealed it. A thousand

witnesses would not prove this more strongly than it is proved by the form and tenor of the instrument itself. This being the case, and the deed having been made part of the declaration by the *oyer* craved of it, a question might be made whether Goode might not have successfully demurred to the declaration; or, if *oyer* had not been craved of the deed, whether he might not have successfully opposed its introduction as evidence, as being variant from the deed described in the declaration, which pleads it as the several obligation of Goode. The exigencies of this case do not require me, nor do I mean, to give any opinion on those points. But the question does arise, and I am obliged to decide, whether the fact pleaded and proved by Goode, that the execution of the deed by Jones was to be the condition of its being obligatory on him, be one of those conditions which the law will disregard, merely because of the tradition by him of the instrument, in its present form, to one of the obligees? I am clearly of opinion, that it is not. The case does not come within the reason of the rule. The fact alleged is not contrary to, but is consistent and conformable with the face of the instrument itself, and the act of the parties. Nor is there any of the danger relied on in the case in *Croke*, of defeating a solemn deed by mere averment; for, as just observed, the averment in this case is consistent with the deed itself. There is also another most remarkable feature in this case, which eminently distinguishes it from all others: the fact on which Goode relies, is not only consistent with the tenor of the deed itself, but is admitted, and even sworn to, by that one of the obligees to whom the delivery was made; who is also one of the plaintiffs in the cause, and who, notwithstanding, has become a voluntary witness on the part of the defendant. In such a case, it seems to be idle to talk of a rule, which is founded on the danger of admitting parol averments repugnant to the acts of the parties. I think the judgment must be affirmed.

BROOKE and STANARD, JJ., concurred.

ALLEN, J. I concur in affirming the judgment, but not for the reason assigned. The second of the additional pleas alleges a delivery as an escrow to Harrison, without showing that he was one of the obligees; to this plea there was a general replication, upon which issue was joined; and upon that issue, as well as on the others, there was a verdict for the defendant. The fact that Harrison was an obligee, came out in the evidence at the trial. But there was no exception to the refusal of the court

to grant a new trial. And even if the evidence could be looked into, the same evidence which showed that Harrison was an obligee, showed also that the parties did not contemplate the delivery of the instrument as a deed. Under such circumstances, the court, in the proper exercise of its discretion, would have been justified in refusing a new trial. On this ground, I am for affirming the judgment.

Judgment affirmed.

DELIVERY OF DEED AS AN ESCROW: See *State Bank v. Evans*, 28 Am. Dec. 400, and note; also, *Jackson v. Catlin*, 3 Id. 415; *Couch v. Meeker*, 7 Id. 274; *Jackson v. Rowland*, 22 Id. 557. There can be no delivery of a deed as an escrow to the obligee therein, but in all such cases the condition upon which the deed was to take effect, is a nullity, and the delivery is absolute: *Foley v. Cowgill*, 32 Id. 49. Though, in *Gilbert v. N. A. F. Ins. Co.*, 35 Id. 543, it was held, that leaving a deed in the hands of a grantee, to be by him transmitted to a third person to hold in escrow till the happening of a certain event, is not a delivery to the grantee so as to vest title in him.

BYARS v. THOMPSON.

[12 LEIGH, 530.]

AWARD IS NOT FINAL, THOUGH SIGNED AND SEALED and read to the parties, where the arbitrators retain the award in their own hands, with a view of hearing any objections that the parties might make, and weighing and deciding them.

RESERVATION OF POWER TO RECONSIDER A CHARGE against the plaintiff does not vitiate the award.

MISTAKE IN AWARD IN RECITING DATE OF SUBMISSION does not invalidate the award.

DELIVERY OF AWARD NEED NOT BE AVERRED in a declaration on the award.

EXECUTION AND DELIVERY OF AN AWARD DEPEND UPON THE EVIDENCE, when the question is, whether an award of a prior or that of a subsequent date shall prevail; and in such case a demurrer to a declaration on the prior award, on the ground that there is "no such award," can not be sustained.

DECLARATION NEED NOT SET OUT THE WHOLE AWARD.

BYARS and Thompson agreed to submit their affairs to the determination of three arbitrators, Russell, Mayo, and Fulton. They entered into a bond the fourteenth of September, 1821, agreeing to the submission, each binding himself in a large sum to abide by the result. On the twenty-first of November, 1821, the arbitrators signed and sealed an award, purporting to be made in pursuance of a submission bearing date the eighteenth of July, 1821 (not the fourteenth of September). The arbitrators found Byars indebted to Thompson in a considerable

sum; they reserved a right to reconsider one claim of a small amount against Thompson. This award was read to the parties, but not delivered. On the twenty-second of November the arbitrators made a correction on the objection of Byars after it was read, and allowed him interest on the items of his account. They then awarded that Byars pay Thompson the balance. Thompson brought an action of debt against Byars on the bond, for his failure to abide by the award. The declaration contained four counts. The first made profert of the bond, set out the substance thereof, then alleged the award of November 21, 1821, and that Byars had refused to pay the sum then awarded. The second was like the first, except that the date of the award was left blank. The third set out the bond or submission *in hæc verba*, and then set out so much of the award in pursuance thereof as was made on the twenty-first of November, 1821, *in hæc verba*. The fourth count made profert of the bond or submission, setting out its substance, and then alleged the award made on the twenty-second day of November (not the twenty-first, as in the other counts). Byars cravedoyer of bond or submission to arbitration, and of the award of the twenty-first and its correction on the twenty-second, and then: 1. Demurred to each count in the declaration, to which plaintiff joined; and he tendered the following pleas: 2. That there was no such award as that mentioned in the first, second, and third counts; 3. That there was no such award as that mentioned in the fourth count; 4. That in the award mentioned in the first three counts there was a mistake in omitting Byars' claim of interest, and that the omission was apparent on the face of the award; 5, 6, 7. That there was no such submission as that recited in the award declared on; 8. That the arbitrators did not furnish a copy of the award to each party; 9. This plea alleged the award void for certain matters appearing on the face thereof. The cause was transferred to the circuit superior court of Wythe, and that court overruled the demurrer to the first, second, and third counts, and sustained it as to the fourth, whereupon defendant withdrew the third plea. The fourth, fifth, sixth, eighth, and ninth pleas were rejected, and the second and seventh admitted. Issues were made upon these pleas. The evidence adduced sufficiently appears from the opinion. Verdict and judgment for Thompson in the sum decreed by the award of November 21. Byars moved to set aside the verdict; the motion was overruled; whereupon he filed exceptions. This court allowed a *supersedeas* upon petition of Byars.

McComas, Johnston, and Preston, for the plaintiff in error.

Sheffey and Patton, contra.

TUCKER, P. In the examination of this case, I deem it fit to enter at once into an inquiry as to the merits and effect of the award in question, which is the foundation of the plaintiff's claim.

The first question that presents itself is, whether the paper in the record purporting to be the award is to be taken as such inclusive or exclusive of the correction made on the twenty-second of November, 1821? in other words, whether the instrument as signed on the twenty-first of November, is to be taken as the true award, or whether the addition and correction which was superadded on the twenty-second, before the delivery, is to be taken as a constituent part of the award itself? If the award was complete on the twenty-first—if the arbitrators had discharged themselves of their duty, if they were in fact *functi officio*, then it is clear that all their power over the subject was gone. But if, on the other hand, it should appear, that the arbitrators had not discharged themselves of their duty; that the act was not *factum* but *in fieri*; that the paper as signed on the twenty-first was not their definitive judgment and so was not complete; that it had never been delivered as their award, but was retained for further reflection and examination; and that the reading of it to the parties, was with intent to hear any objections on either part, that they might be duly considered and weighed before this *tempus penitentiae* should be closed forever; then it is equally clear to my mind, that the instrument as executed on the twenty-first of November was not the true award, and that the award never was complete until the execution of the twenty-second of November, whereby the correction as to interest was made a constituent part of the award itself, and is not to be looked upon in the light of an *ex post facto* correction of an antecedent complete and final award.

The position I have here laid down is, I am persuaded, in strict concordance with the spirit of the cases upon the subject. It is admitted, indeed, to have been decided, that delivery is not essential to the validity of an award, unless made so expressly by the submission. That the award is ready for delivery, will suffice: *Brown v. Vawser*, 4 East, 584; *Henfree v. Bromley*, 6 Id. 309; 17 Ves. 237. And when the arbitrators have finally discharged themselves of their duty, no resumption of their authority can be recognized, and every subsequent at-

tempt to alter and correct their judgment can only be looked upon as void. Such was the case of *Henfree v. Bromley*, where, by the submission, the umpire was to make his award under his hand, ready to be delivered by a certain day. On the day he awarded against the defendant fifty-seven pounds and signed the award; recommending, at the same time, by parol, that they should divide the costs. He put the award into his attorney's hands, who immediately sent notice to the defendant that the award was executed and ready to be delivered. Here, then, was a complete and final award, of which notice was given to the defendant, as executed and ready for delivery. It was, therefore, no longer *in fieri*. All power over it was gone. Yet the umpire, hearing that the defendant refused to pay his share of the costs, struck out the fifty-seven pounds, and inserted sixty-six pounds, in order to cover them, and then he re-signed with a dry pen. This was, obviously, a new and distinct act of judgment, formed by him after his authority was spent and he was *functus officio*. And so it was decided.

But if the signing and sealing by the arbitrators was not with intent to determine and conclude their judgment, if they still retained the award in their own hands, with the view of hearing any objections that the parties might offer, and of weighing and deciding on them, if, in other words, the award was not only not delivered, but not ready to be delivered, then I think it equally clear that it is not their judgment; it is not their award. It wants that finality which is essential to every award. It wants that final determination of the judgment which is essential to a decision. It is a suspended and not a final judgment, and of course can be no award.

Such in my opinion is the case here. It is stated indeed, "that upon objections being made by Colonel Byars to the award after it was signed and read to the parties," the arbitrators proceeded to consider them. This, I allow, is strong language. It speaks of the instrument of the twenty-first of November as "the award," and states that the objections were made after it was signed and read. But though so called, we find from the testimony of the arbitrators, that it was not considered as their final award. The two arbitrators who gave testimony in the cause concur in stating, that the instrument was signed, sealed, and delivered as an award to the parties, having been read in their presence before delivery, which (the delivery) did not take place till after the objections made by Byars were considered, and the reduction was made; this reconsideration

produced a reduction of the amount, so as to give Byars a credit of three hundred and seventy-six dollars and twenty-five cents. This being made, an addition was made to the award, which was signed, sealed, and delivered by the arbitrators to the parties in the presence of each other on the twenty-second of November, 1821. "In this addition to the award (they say) we decided, and so expressed, that Byers should pay to said Thompson one thousand eight hundred and seven dollars and fifty-seven cents, one half in three months, and the other half in six months from the twenty-second of November, 1821, the date of the said additional writing, with interest on the whole from the said date. I intended (says Mayo, and Russell adopts his evidence) the latter as my award, and acknowledged and delivered it as such. The addition is annexed to and is on the same paper which contains the first opinion expressed by the arbitrators." From this testimony it is clear to my mind that the paper signed on the twenty-first of November was not the definitive judgment of the arbitrators. It was indeed the opinion which they then entertained, but which they suspended until they could hear any objections which could be suggested by the parties interested; a course which I think not only legal but laudable.

I am then of opinion that the paper purporting to be executed on the twenty-second of November was the true award, and not that which had been signed and sealed the day before.

Before we pursue this conclusion to its consequences, it becomes necessary to inquire, whether the reservation of the power to reconsider a charge against the plaintiff of one hundred and fifty dollars vitiates the whole award or not. I think it does not. The arbitrators have awarded to Thompson one thousand eight hundred and seven dollars and fifty-seven cents; and if this matter had been or should be decided in his favor, he would be entitled to one thousand nine hundred and fifty-seven dollars and fifty-seven cents. However, the matter, then, as to that one hundred and fifty dollars might be, Thompson is entitled without controversy to the one thousand eight hundred and seven dollars and fifty-seven cents. Byars has nothing to complain of, if we consider the award good, and the reservation only void. He could only lose, and not gain, by the reconsideration of that question. If they had awarded against him a heavy sum, leaving undecided an important credit which would reduce that sum, he might well complain. But here, the effect of the reconsideration and change of opinion could only be to increase the demand against him. All then that he can ask is, that this reservation of a right

to charge him at a future day the additional one hundred and fifty dollars should be held void: and such I think it is unquestionably. But it does not affect the one thousand eight hundred and seven dollars and fifty-seven cents which is substantive and unconnected with the question reserved, and for which the award is therefore good. If we consider—as perhaps we ought to do, in support of the acts of the arbitrators—the reservation as being only of the power of reconsidering the question at any time before the award should be delivered, then it would be valid indeed, but the result would be the same. For the delivery of the award without change as to the point reserved, must be regarded as concluding the question, and as evincing that after the exercise of the reserved right, the arbitrators had found no sufficient reason to modify their award as to the one hundred and fifty dollars. In neither view, then, can the reservation in question have any effect upon the award between the parties.

What then are the consequences of this view of the award upon the present case? Let us look, first, to the pleadings.

There are four counts in the declaration, to all and each of which there is a demurrer. That demurrer, in the opinion of this court, should not have been sustained as to either count. Preliminary to and as part of his demurrer, the defendant prayedoyer of the submission, to which he had a right, and which was accordingly read to him. He also prayedoyer of the award, to which he had no right; and that being also read to him, he objects, as fatal, the variance between the true date of the submission and the date recited in the award. In the opinion of this court, however, the plaintiff having in his declaration averred that the award was made in pursuance of the submission, that matter was matter of fact for the jury, who might find upon evidence, that the date on the face of the award was mistaken. The second objection, that the arbitrators reserved a right to reconsider, is deemed of no weight, as that did not affect the award. The third objection was to the failure to aver that a copy of the award had been delivered. But this the court does not deem necessary to the validity of the award, and so not necessary to be averred. The fourth objection is the discovery of the error and its correction, and so the plaintiff improperly demanded two thousand one hundred and eighty-three dollars and eighty-two cents, instead of one thousand eight hundred and seven dollars and fifty-seven cents. But it depended upon the testimony that was to be adduced, and not merely upon the paper as it appeared, whether the act of the twenty-first or that of the

twenty-second of November was the true award. If upon trial of the issue of no such award, on the three first counts (to which alone this objection applies), it had appeared, that the paper, as sealed on the twenty-first, was final, and delivered as such, then the objection was invalid. If, on the other hand, it appeared that the act was still incomplete and *in fieri*, then the paper as executed on the twenty-second was the true award. The matter, then, depending on evidence as to the execution and delivery of the award, could not properly have been made the subject of demurrer to the declaration. I do not think that either of the three first counts should have been adjudged bad on demurrer, although, upon the view of the case taken by this court, it is unimportant, since on the plea of no award, they are unsustained by the evidence. As to the fourth count, the court is of opinion, that it is good, and that the demurrer to it should have been overruled.

The objection to the first, second, and fourth counts, that they do not set out, or profess to set out, the whole award, is untenable. It is not necessary to do so in the declaration. The only case in which it is necessary (if it be necessary in that), is when an action of debt is brought for the penalty of a bond conditioned to abide by an award, and the defendant, taking oyer of the condition, pleads no award, and the award is for the first time brought out in the replication. In such case, it has been said, that the replication must set out the whole award. But if it be so, it results from the technical rules of pleading, which have no application to a declaration on an award, as in this case, in an action for the penalty in an agreement for submission, in which the setting out so much of the award and the breach of it, as entitles the plaintiff to his action, is a necessary part of the declaration.

Next as to the pleas. The second was admitted. The third (which was to the fourth count) was a good plea, but was withdrawn because the count was declared bad. It may be filed again to that count if there be a new trial. The fourth plea is, that there was an error of three hundred and seventy-six dollars and twenty-five cents on the face of the award. This was not a good plea; not to the three first counts, because it contradicted the award, if the act of the twenty-first of November constituted the award; nor to the fourth, because that demanded only the balance after correcting that error. The fifth and sixth pleas are covered by the seventh which was sustained, and there was neither necessity nor propriety in pleading the same matter over

in several pleas. The eighth plea is, that a copy of the award was not furnished. This was not essential to the action, and so the plea was not good. The ninth plea was bad, because it called in question the award for errors alleged to appear on its face, which could not be established without reference to matter *aliunde*.

Looking, then, upon the declaration as good in all its counts, the demurrer to the fourth count should not have been sustained, and the verdict upon the plea of no such award to the other three should have been for the defendant. There must then be a new trial upon those counts, unless the plaintiff shall release the excess of the verdict over the demand set forth in the fourth count, in which event judgment should be entered for the amount of that demand. If the plaintiff refuses to release, the verdict must be set aside, and a new trial awarded of the issues upon the three first counts, and the untried issues upon the fourth.

CABELL and BROOKE, JJ., absent.

SUFFICIENCY OF AWARD: See *Barretts v. Patterson*, 1 Am. Dec. 576; *Blackledge v. Simpson*, 2 Id. 614; *Brickhouse v. Hunter*, 4 Id. 528; *Walsh v. Gilmer*, 6 Id. 502; *Coghill v. Hord*, 25 Id. 148; *Doolittle v. Malcolm*, 31 Id. 671. See note to *Elmendorf v. Harris*, 35 Id. 587, for a discussion of the subject of the impeachment of awards.

WHO MAY SUBMIT TO ARBITRATION: See note to *Hutchings v. Johnson*, 30 Id. 626, where this subject is discussed.

WALLACE v. SHAFFER.

[12 LEIGH, 622.]

ASSIGNMENT OF TITLE BOND executed with the condition that the obligor should make the obligee a good title to a certain tract of land, does not affect the duty of the obligor to make a good title to the obligee, and a tender of a deed of the land to the assignee is not a performance of the condition.

DEBT on bond by Wallace, for benefit of Bradley against Shaffer. The bond was conditioned to deliver Wallace a certain tract of land. There was a penalty attached in case of non-performance, and this suit is for the penalty. Wallace indorsed the bond to Miller, who indorsed to Bradley, for whose benefit suit is brought. Shaffer pleaded: 1. Conditions performed; and 2. That after the assignment to Miller, and before his assignment to Bradley, defendant and his wife tendered a deed, duly executed

and acknowledged, to Miller, of the land. Replications were filed and issue joined. The defendant produced the deed offered to Miller to support his first plea. This deed was rejected, and defendants excepted. The jury found for the defendant; judgment was rendered on the verdict; and this court allowed the plaintiff a *supersedeas*.

Johnston, for the plaintiff in error.

Fulton, *contra*.

By Court. The circuit superior court erred in overruling the plaintiff's motion for a new trial. The verdict of the jury was not sustained by the evidence, the plea of conditions performed being altogether unsupported. No evidence appears to have been introduced even tending to prove the making of a deed to Wallace, to whom, by the condition of the title bond, it was to have been made. The imperfect proof of the execution of a deed to Miller, was not evidence under the plea of conditions performed; nor would the deed have been evidence under that plea, if the proof had been complete. As to the second plea of the defendant, it was manifestly bad, since Miller, though the owner of the title bond, was not the person to whom the title was to have been conveyed; and, therefore, he had a right to refuse to accept it, as he is alleged in the plea to have done.

Judgment reversed, and cause remanded for a new trial.

TUCKER, P., and CABELL, J., absent.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

ALLEN AND DEAN v. BRADFORD.

[3 ALABAMA, 281.]

JUDGMENT IN FAVOR OF ONE IN AN ACTION BY TWO is irregular.

AMENDMENT, NUNC PRO TUNC, OF JUDGMENT upon which no execution has issued within a year and a day, is proper, but *scire facias* will still be necessary to entitle the plaintiff to execution.

ENTRY OF JUDGMENT NUNC PRO TUNC WITHOUT NOTICE is good.

SUFFICIENT WARRANT FOR JUDGMENT NUNC PRO TUNC may be furnished by the declaration showing in whose favor judgment should be entered.

RECITAL IN ENTRY OF JUDGMENT NUNC PRO TUNC that the mistake in the first entry was "satisfactorily shown," warrants the presumption that there was legal proof of that fact.

ERROR to St. Clair circuit court. The only question was as to the sufficiency of an entry of judgment, *nunc pro tunc*, in favor of both plaintiffs in an action brought by them as administrators of a decedent on a certain note, the original entry of judgment having been by mistake made in favor of one only of the plaintiffs. The points relied on sufficiently appear from the opinion.

W. B. Martin, for the plaintiffs in error.

No counsel appeared for the defendant.

COLLIER, C. J. It is undoubtedly true, that the first judgment is irregular in being rendered in favor of one of the plaintiffs only. It is no objection to the amended judgment, that no execution had issued within a year and a day, on the original judgment, but if a *scire facias* was necessary to entitle the plaintiff to an execution, when the amendment was made, the amendment, which

was an entry *nunc pro tunc*, would not in this respect, place the plaintiffs in a better condition.

This court has repeatedly holden, that a judgment *nunc pro tunc* may be entered, though no notice is given to the opposite party: *Fugua and Hewitt v. Carriel and Martin*, Minor 170;¹ *Clemens v. Judson and Banks*, Id. 395. In point of law, no inconvenience can result from the want of notice, as such judgments are always founded on matter of record, or some entry or memorandum in the cause, and can not be gainsaid by showing to the court extraneous facts. A judgment *nunc pro tunc* is merely consummating what the court had ordered, or but imperfectly performed, and as it has a retrospective relation, nothing that has occurred *post factum* can be presented in opposition to it.

The declaration sufficiently shows in whose favor the judgment of the circuit court should have been rendered, and in the absence of any other memorandum or entry, furnished a sufficient warrant for the judgment *nunc pro tunc*. But if anything farther was necessary, it might perhaps be intended from the recital in the record, that it was satisfactorily shown to the court, the first entry was irregular through mistake; that the court was satisfied by legal proof: See *Thompson v. Miller*, 2 Stew. 470; *Draughan and others v. The Tombeckbee Bank*, 1 Id. 66 [18 Am. Dec. 38]; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Mays et al. v. Hassell*, 4 Id. 222 [24 Am. Dec. 750].

The consequence is, the judgment must be affirmed.

NUNC PRO TUNC ENTRY OR AMENDMENT OF JUDGMENTS OR OTHER ORDERS: See *Fugua v. Carriel*, 12 Am. Dec. 46, and note; *Wilson v. Myers*, 15 Id. 510; *Ohichester v. Cande*, Id. 238, and note; *Ludlow v. Johnson*, 17 Id. 609; *Draughan v. Tombeckbee Bank*, 18 Id. 38; *Mays v. Hassell*, 24 Id. 750; *Davis v. Hooper*, Id. 751; *Den v. Tomlin*, 35 Id. 525. In *Jones v. Hart*, 60 Mo. 360, the principal case is referred to by Sherwood, J., dissenting, as an authority for the rule that where a judgment has been by mistake of the clerk entered as a special judgment instead of a general judgment, as required by the verdict, the proper entry may be made at a subsequent term *nunc pro tunc*, the record furnishing the means of correction. A mere clerical misprision in an entry of judgment, which may be corrected by reference to the summons and complaint, is not a ground of reversal, since the entry may be amended to conform to the complaint: *Pool v. Minge*, 50 Ala. 101. A judgment may be entered *nunc pro tunc*, without notice: *Oswitcher Co. v. Hope*, 5 Id. 636; *Bancroft v. Stanton*, 7 Id. 355. But the rule does not apply to the setting aside of a final decree in favor of distributees on the settlement of an administration account on petition of the personal representative of a deceased distributee at a subsequent term, without notice to the other distributees: *Thomas v. Dumas*, 30 Id. 86. A judgment may be amended *nunc pro*

1. *Fugua v. Carriel*, 12 Am. Dec. 46.

tunc, though a year and a day have elapsed without execution: *Bancroft v. Stanton*, 7 Id. 355. Where the entry of a judgment *nunc pro tunc* recites that it was made to appear to the court that a judgment had been duly rendered which the clerk omitted to enter, it will be presumed that it was made to appear by proper evidence: *Glass v. Glass*, 24 Id. 471. In all these cases *Allen v. Bradford* is cited as authority.

MANN v. BUFORD.

[3 ALABAMA, 312.]

ATTORNEY MAY BE GARNISHED FOR MONEY IN HIS HANDS collected for the execution debtor.

GARNISHEE'S ANSWER SUFFICIENTLY ADMITS INDEBTEDNESS to the execution debtor to authorize judgment against such garnishee, even though it contains no express admission, if it states facts showing such indebtedness to exist.

WRIT OF ERROR JOINING GARNISHEE AND EXECUTION DEBTOR brought to reverse a judgment discharging the garnishee is irregular, but if no objection be made to such misjoinder, the defect is waived.

ERROR to Barbour county circuit court to reverse a judgment discharging the defendant in error from liability as garnishee of one Lanier, against whom the plaintiff in error had judgment, though the record did not set it out. The facts were, as stated in the answer of the garnishee, that he was an attorney; that he or his partner, now deceased, had received a certain note for collection; that he supposed it was from the defendant in execution, as it was sued in his name; that the amount had been collected, and was in the garnishee's hands as attorney, and that he owed the same, less his commissions, to the defendant in execution, if the note was received from him, which the garnishee did not certainly know. On this answer the garnishee was discharged, and the plaintiff brought error.

Harris, for the plaintiff in error.

Buford, pro se.

GOLDTHWAITE, J. 1. An attorney is not exempt from garnishee process, in consequence of the connection which exists between him and the courts of law. He is not an officer of the law, although the courts frequently exercise a summary control over him, but this is only for the advancement of justice, by compelling the performance of well-known duties to his clients, who are suitors in the courts. For every other purpose, he is the mere agent for his client, and when he also becomes his debtor, he may be garnished, as any other person.

2. It is supposed, in the argument which the garnishee has submitted, that the admission of indebtedness, contained in this answer, is not sufficiently distinct to authorize any judgment. It is certainly settled by repeated decisions of this court, that the answer must contain an admission of indebtedness: *Smith v. Chapman*, 6 Port. 365, and cases there cited. Here, there is such an admission, not, it is true, in so many words, that he owes the defendant in execution so much, but no other conclusion can arise, from the facts which are stated, and if the same facts were proved by the defendant in execution in a direct suit against the attorney, a judgment for the specified sum would be the necessary consequence. It is precisely the same principle which was decided by us in the case of *Baker v. Moody*, 1 Ala. (N. S.) 315.

We have no hesitation in reversing the judgment, and should render it here against the garnishee, for the proper sum, if the judgment against the defendant in execution was shown.

As the record does not set out this judgment, the cause must be remanded for further proceedings.

We remark that the writ of error is irregular in joining the defendant in execution, with the garnishee, but as no action is requested, we presume, conformably to our recent course of practice, that the defect is waived.

MONEY IN CUSTODIA LEGIS NOT ATTACHABLE: See *Dawson v. Holcomb*, 13 Am. Dec. 618; *Bowden v. Schatzell*, 23 Id. 170; *Prentiss v. Bliss*, 24 Id. 631.

GILES v. WILLIAMS.

[3 ALABAMA, 316.]

PLEA THAT BOND WAS MADE WITHOUT CONSIDERATION is good in Alabama.

PLEA THAT CONSIDERATION OF BOND HAS FAILED in that it was given for the purchase of land, but that no title or covenant of title was then or afterwards made, and that the plaintiff can not make title, is bad because it impliedly admits that the contract is not rescinded, and that the defendant has possession.

VENDEE IN POSSESSION CAN NOT DEFEND against an action for the payment of the purchase money of land.

PLEA THAT BOND WAS OBTAINED BY FRAUD without alleging the facts constituting the fraud is bad.

ERROR to the Tallapoosa county circuit court, in debt on bond, to which the defendant pleaded three pleas, the nature of which is stated in the opinion. On demurrer all the pleas were adjudged bad, and the defendant brought error.

T. Clay, for the plaintiff in error.

Pryor, contra.

ORMOND, J. The questions of law in this case, are presented on the pleadings.

1. The first plea is, that the bond sued on, was made without any consideration whatever. This form of pleading grows out of our statute, which makes every writing, whether under seal or not, evidence of the debt, or the duty for which it was given, and permits the defendant, by plea, to impeach the consideration of a bond, in the same manner as if it had not been sealed: Aik. Dig. 283. If a note or bond, then, is executed without any consideration, the plea must, of necessity, be in the negative; it is not possible to plead or state that affirmatively, which has no existence. If in truth, there was a consideration, the plaintiff in his replication may set it out, upon which the defendant must take issue. The demurrer to this plea, therefore, should not have been sustained.

2. The second plea alleges that the consideration for which the bond was given, has wholly failed in this, that it was given for a piece of land; that no title or covenant for title, was executed at the time; that no title has yet been made, nor is it in the power of the plaintiff to make one. This plea can not be supported. It impliedly, at least, admits that the contract for the sale of the land, is not rescinded, and he therefore has the benefit of the contract on his part, by the possession of the land. It is the settled law of this court, that a vendee in possession of land, can not defend himself, in an action at law, for the purchase money, while he retains the possession. The only exception hitherto admitted to this rule, is, that a vendee may, under certain circumstances, apply to a court of chancery, to rescind the contract, before eviction, and without abandonment of the possession: *Young v. Harris*, 2 Ala. 108.

3. The third plea, which alleges that the bond was obtained by "fraud, covin, and misrepresentation," is clearly bad. It is a well-settled principle, at common law, that a fraud, which will vacate a deed, in a court of law, must be a fraud which relates to the execution of the instrument; as for example, that it was falsely read to the party. This question was discussed at large by this court, in the case of *Swift v. Fitzhugh*, 9 Por. 63, and again in *Mordecai and Wanroy v. Tankersly*, 1 Ala. 100; and see *Taylor v. King*, 6 Munf. 366 [8 Am. Dec. 746].

The counsel for the plaintiff in error has referred us to a prece-

dent in 2 Ohit. Pl. 495, where a plea, that a deed was obtained by fraudulent misrepresentations, is given. But it is denied that this precedent is supported by any authority; see the cases cited from 6 Munf., and *Dow v. Mansell*,¹ 13 Johns. 430; and the case of *Wyche v. Macklin*, 2 Rand. 426. We have also been referred to the case of *Pemberton v. Staples*, 6 Mo. 59, where a plea of fraud, of this general character, was admitted on the authority of Chitty. The opinion is short and unsatisfactory—the court admitting, that there was a conflict of authority, but that it had not access to them, to ascertain the extent of the disagreement.

When this question was presented to this court, previously, in the cases cited, it was as a question of evidence, and had reference not to the consideration, but to the validity of the deed. Considered as a question of pleading under our statute, there can be no doubt, that the consideration of a deed may be impeached by alleging such facts as would, in law, amount to a fraud. The objection to this plea, is not that the consideration of a bond may not be impeached by an allegation of fraud, but that instead of stating the facts, which constituted the fraud, the pleader has stated a conclusion from facts, which are not disclosed, and the demurrer to it was, therefore, properly sustained.

For the error of the court, in sustaining the demurrer to the first plea, the judgment must be reversed, and the cause remanded.

PLEA THAT BOND IS VOLUNTARY and without either a good or valuable consideration is sufficient, because in such a case there are no special facts to aver: *Huston v. Williams*, 25 Am. Dec. 84.

PLEA OF FAILURE OF CONSIDERATION.—If a defense is founded upon a total or partial failure of consideration, or upon fraudulent acts or representations affecting the consideration, the special facts must be pleaded: *Huston v. Williams*, 25 Am. Dec. 84. A plea to an action on a note that it was given in consideration of a bond to convey lands in fee simple within a specified time, and that the lands were not so conveyed, and that the vendor had no title, is good: *Tyler v. Young*, 35 Id. 116.

VENDEE IN POSSESSION CAN NOT BE RELIEVED FROM PAYMENT of the purchase money, or set up any outstanding title: *Abbott v. Allen*, 7 Am. Dec. 554, and note; *Barkhamsted v. Case*, 13 Id. 92, and note; *Greeno v. Munson*, 31 Id. 605; *Larkin v. Bank of Montgomery*, 33 Id. 324.

GENERAL PLEA OF "FRAUD, COVIN, AND FALSE REPRESENTATION" in bar to an action on a writing obligatory, is held sufficient to entitle the defendant to show any false, fraudulent, or covinous conduct of the obligee in procuring the execution of the writing from which it would appear that in legal effect the obligor never executed the bond: *Huston v. Williams*, 25 Am. Dec.

1. *Dorr v. Munsell*.

84; and see the note to that case for a general consideration of the subject of pleading fraud. A plea that a sealed note was obtained by fraud, covin, and misrepresentation is good on demurrer, and fraud may be specially pleaded in bar, without averring the acts constituting the fraud, even where evidence thereof might be given under the general issue: *Saunders v. Stotts*, 27 Id. 263; *Ross v. Braydon*, 26 Id. 445. So a general plea of fraud, covin, and misrepresentation is held to be good on special demurrer in assumpsit for goods sold and delivered: *Elliott v. Coggshall*, 30 Id. 365. In *Baird v. Baird's Heirs*, 31 Id. 399, it was held that an allegation in a bill that a sale was unjust, iniquitous, and fraudulent, was impertinent if not accompanied by a statement of facts showing wherein the fraud consisted. Fraud in the execution of a deed is available in an action at law, but where the fraud relates to transactions preceding the execution of the instrument the remedy is in equity: *Taylor v. King*, 8 Id. 746; *Thomas v. Thomas*, 13 Id. 220.

BABCOCK v. HERBERT.

[3 ALABAMA, 392.]

LICENSED FERRYMAN HAS NO AUTHORITY TO PLACE ROPE ACROSS A NAVIGABLE STREAM which obstructs navigation, and if he does so, he is liable for any injury resulting therefrom.

KEEPER OF PUBLIC FERRY IS LIABLE AS A COMMON CARRIER.

ERROR to Dallas county circuit court, in an action on the case to recover damages for a sulky, belonging to the plaintiff, which was lost while being transported across the Cahawba river on the defendants' ferry boat. The first and second counts of the declaration charged the defendants as public ferrymen and common carriers. The substance of the third and fourth counts is stated in the opinion so far as material to the points decided. The defendants demurred to all the counts, but the demurrers were overruled. The court, against the request of the defendants, charged the jury that the defendants were liable as common carriers, and not merely for negligence. Verdict and judgment for the plaintiff, which the defendants brought error to reverse. The points relied on sufficiently appear from the opinion.

Peck and Clarke, for the plaintiffs in error.

Thornton, contra.

ORMOND, J. Objections have been taken to the third and fourth counts of the declaration, but although not very formal, we think they are substantially correct. It is supposed that the third count does not show that the plaintiffs in error had any agency in the loss of the sulky, but that from the count it appears to have been the unauthorized act of their servants, for

which they are not responsible, and the case has been assimilated to the doctrine established by this court in *Cawthorn v. Deas*, 2 Por. 276, where it was held, that "the master was not liable for injuries caused by the negligent conduct of his slave, whilst not acting in his master's employment, or under his authority."

The language employed in this count is, "that the ferry-flat of the defendants was then and there under the care, government, and direction of three servants of the said defendants," etc. We do not consider that it follows from the language used, that the agents of the defendants in the management of the boat were slaves; but if that was the necessary inference, we think it sufficiently appears from the reference in this count to the previous counts (for the sake of brevity), by the use of the terms, "for the purposes aforesaid," that the servants of the defendants were in their employ, navigating the boat across the stream as a common ferry-boat.

The fourth count charges the loss to have occurred from an obstruction thrown across the Alabama river, below the ferry, on the Cahawba river, by the defendants. It is supposed that, as the defendants were the owners of the lower ferry, also, and as it was a usual and common, if not necessary means of crossing the river, to stretch a rope from one side to the other, to pull the boat over by, that therefore the plaintiffs in error are not responsible for an injury arising from that cause.

We can not agree that a license to keep a ferry on any of our navigable streams authorizes the grantee of the ferry to place any obstruction across the stream, even if such were convenient or proper to the passage of the ferry-boat. The license merely amounts to a monopoly of the right of transporting passengers and property across the stream at that point, and this right must be exercised in subordination to other rights vested in the people at large; among which is the right to navigate the rivers of the state, declared by law navigable, of which the Alabama river is one. As, therefore, this obstruction placed across the Alabama river was unlawful, it subjects those placing it there to an action at the suit of any one injured by it, and the count was properly sustained.

The question upon the merits is, whether the keeper of a public ferry is liable, as a common carrier? On the part of the plaintiffs in error, it is insisted that he is not, because the whole matter is regulated by the statute, pointing out his rights and

duties, and requiring him to enter into bond with surety, for their performance.

The act, Aik. Dig. 363, sec. 26, authorizes the county court to establish ferries and fix the rate of toll or ferriage, on persons or property carried across the same, and requires the court to take a bond, with surety, from the person so applying, in the sum of one thousand dollars, conditioned "that he will keep a good and sufficient boat or boats, and keep the banks on each side of the watercourse in good repair, and that the ferry shall be well attended for travelers or other persons to carry or pass their horses, carriages, or effects, over such watercourse." The law also provides, sec. 29, that any one detained at any public ferry, by reason of the ferryman not having good and sufficient boats, or other proper craft, and hands, or by neglecting to do his duty, may, by action before any justice of the peace, recover the sum of ten dollars; and that such recovery shall not be a bar to any action for damages sustained by reason of the insufficiency of the ferry.

A common carrier, is one who undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place; this is the definition adopted by Mr. Justice Story, in his work on Bailments, and is doubtless correct. This definition corresponds to the duties of a common ferryman, with one exception, which certainly can not affect the question. It is that those who employ him have no choice; his right to transport the property of the traveler, is a monopoly granted by the state, and from that in part, results the right on the part of the state, to regulate his price, and to exact from him a bond, with surety, that he will provide, and always have in readiness, the means for transporting across the stream, the persons and effects of travelers. It by no means follows, that because the state has, for the security of the traveler, and as the price of the monopoly granted, exacted from the ferryman a bond, with surety and stipulated for the rates of ferriage, that the common law liability which attaches to the carriage of goods for hire, does not arise. The bond and surety is an additional security afforded by the state, because of the public nature of the ferryman's employment. Nor does the fact that the state regulates the rate or toll, at all affect the question. In England, a great many statutes have been passed, regulating the prices of the carriage of goods by common carriers, which may be seen enumerated in 1 Bac. Abr. 557; and it never has been supposed that the passage of these acts varied their liability as common

carriers, which arises from the public nature of their employment.

An argument has been urged on the court, that the reason of the rule of the common law in regard to common carriers does not apply to common ferrymen, and that they should be held only answerable for injuries arising from neglect. The answer to this is, that such has always been the law: See *Rich v. Kneeland*, Cro. Jac. 330, and the cases ancient and modern, cited in the notes by Mr. Justice Story, in his work on Bailments, 323. It does not become a court, when the law is clear and settled beyond a doubt, to speculate upon consequences. Arguments of that description are more properly addressed to another forum. In conclusion, we are satisfied, that according to the ancient as well as modern authorities, ferrymen have always been considered as common carriers, and the circumstance, that in this state they are required to give bond, with surety, and that the price they receive is regulated by law, does not affect their liability at common law.

The last charge of the court, that the defendants were not bound to cross the river if in an impassable state, we need not consider; as the defendants did cross, the question did not arise, and being purely abstract, could not by possibility, if decided wrong (which we do not intend to intimate), prejudice the defendants.

The judgment of the court below is, therefore, affirmed.

COMMON CARRIER, WHO IS: See *Gordon v. Hutchinson*, ante, 464, and cases cited in the note thereto. That a public ferryman is liable as a common carrier is held in *Whitmore v. Bowman*, 4 G. Greene, 151, and in *Slimmer v. Merry*, 23 Iowa, 94, citing the principal case among others.

McRAE v. STOKES.

[3 ALABAMA, 401.]

ATTESTATION OF CLERK TO TRANSCRIPT OF JUDGMENT OF ANOTHER STATE is sufficient under the act of congress of 1790, if it complies with the form prescribed for the court where the proceeding was had, and the certificate of the presiding judge is the only evidence of such compliance.

CLERK'S CERTIFICATE THAT RECORDS HAVE BEEN TRANSFERRED BY LAW to his court from the court in which the judgment was originally recovered, appended to a transcript of a judgment of another state, together with the presiding judge's certificate that the attestation is in due form, is sufficient evidence of such transfer without producing the law.

ERROR to the Marengo circuit court in debt on the exemplification of a judgment recovered in the superior court of law of the town of Petersburg, Virginia. The plaintiff produced a transcript of the judgment, with a certificate in the following form appended thereto: "State of Virginia, Town of Petersburg, to wit: I, Henry Bunly Gaines, clerk of the circuit superior court of law and chancery, for the town aforesaid, in the state of Virginia (to which court the records of the late superior court of law, for said town, are now by law transferred), do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain action of debt lately depending in the said superior court of law between, etc.; with all things touching the same as fully and wholly as they now exist among the records of my office. In testimony whereof," etc., duly signed and sealed. Appended to this was a certificate by John F. May, "one of the judges of the general court, and sole judge of the circuit superior court of law and chancery for the town of Petersburg, in the state of Virginia," to the effect that the said H. B. Gaines is "clerk of the said circuit superior court of law and chancery of the said town, and that his attestation is in due form." The defendant objected that the transcript was not duly authenticated. Objection overruled. Verdict and judgment for the plaintiff, and the defendants brought this writ of error.

Lyon, for the plaintiff in error.

Erwin, for the defendants in error.

COLLIER, C. J. By the act of congress of the twenty-sixth of May, 1790, it is enacted, "that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." Under this statute it is uniformly held, that the judgment of a court of one of the states is of the same dignity in every other as that in which it is pronounced, and the act merely prescribes certain forms, which, if complied with, entitle it to admission as evidence in the courts of the sister states.

The terms "in due form," do not mean that the attestation of the clerk shall be according to the form used in the state where the record was offered in evidence, or to any other form generally observed; but according to the form prescribed for the court where the proceeding was had, and the certificate of the

presiding judge is made the only evidence that such form has been complied with: *Drummond v. Magruder*, 9 Cranch, 122; *Smith v. Blagge*, 1 Johns. Cas. 238; *Barbour v. Watts*, 2 A. K. Marsh. 292; *Craig v. Brown*, 1 Pet. 352; *Henthorn v. Doe*, 1 Blackf. 160.

It has been held, that the attestation of the clerk need not expressly state that the transcript is a copy of all the proceedings in the case. If he certifies that the transcript is correctly copied from the record of the proceedings of the court, and it appears to be complete, it is sufficient: *Mudd v. Beauchamp*, Lit. Sel. Cas. 142. And in *Ferguson v. Harwood*, 7 Cranch, 408, the clerk certified, "that the foregoing is truly taken from the record of the proceedings" in this court. The certificate of the judge was regular, and the court held that the presumption was, that the copy of the record was complete.

But it is argued for the plaintiff, that the attestation of the clerk that the records of the late superior court of law, etc., were transferred by law to his court, is no evidence of that fact, but the law by which the transfer was made must be shown. The influence accorded to the certificate of the judge furnishes a sufficient refutation of this argument. But an objection, precisely similar, was considered in *Thomas v. Tanner*, 6 Mon. 52. In that case, it appeared that the records of a former territorial judge of probate were, on the admission of the territory into the union, transferred to the clerk of the county court. It appeared, on the face of the transcript, that a part of the proceedings was had before the territorial probate court, and the other part, since the change of government, before the county court. It was insisted, that the law authorizing the transfer of the records, and their attestation by the clerk of the county court, should be proved; but the court were of opinion, that the attestation of the clerk and certificate of the judge were entitled to full credit, and that everything should be presumed right, according to the local law. This case, it will be observed, is directly in point, and confirmatory of the principles we have laid down.

Had the clerk in his attestation, omitted to state that the record had been transferred to his office by law, the inference would have been that it was legally there, and that he was the proper officer to attest it. We can not conceive why the express affirmation of what would otherwise be implied, should make it necessary to establish the fact by proof.

We are of opinion, that the transcript was regularly authen-

ticated, and the judgment of the circuit court is therefore affirmed.

AUTHENTICATION OF TRANSCRIPT OF JUDGMENT OF ANOTHER STATE or of a United States court, when sufficient: See *West v. McConnell*, 25 Am. Dec. 191; *Merrivether v. Garvin*, 27 Id. 650; *Adams v. Lisher*, 25 Id. 102.

MOORE v. TARLTON.

[3 ALABAMA, 444.]

EQUITY WILL NOT AID GRANTEE IN DEED WHICH IS FRAUDULENT in fact, and would therefore be declared void in a court of law as against the grantor's creditors, because, though absolute in its terms, it was really intended merely as security for a debt not exceeding one fifth of the consideration expressed, and the grantee can not maintain a bill against a creditor of the grantor subsequently purchasing the land on execution on his own judgment, to have such deed declared a security for the amount really due, and to subject the premises to payment thereof.

ERROR to the Mobile chancery court to reverse a decree dismissing the bill of the complainants with costs. The bill alleged in substance that William S. Paine, in May, 1837, to indemnify the plaintiffs against a certain bill of exchange previously drawn by them, as alleged, for the benefit of a certain firm, of which the said Paine was a member (which bill the plaintiffs had since been compelled to pay), and also to secure a certain other debt due from Paine to the plaintiffs, conveyed certain premises by deed to Moore, one of the plaintiffs. The whole amount intended to be secured by the deed, as appeared by the bill, was about one thousand six hundred and twenty dollars. The deed, however, which was annexed to the bill as an exhibit, was expressed to have been made upon a consideration of eight thousand five hundred dollars paid to the grantor, and was absolute and unconditional in its terms. The bill further alleged that after the execution of the deed the defendant Tarlton and another recovered several judgments against Paine, amounting in the aggregate to about five thousand four hundred dollars, and that upon executions issued upon these judgments, the land conveyed to Moore as aforesaid was levied upon and sold for twenty-five dollars to Tarlton, defendant, who was now in possession, and refused to pay the plaintiffs' claims against Paine; wherefore a decree was asked, directing him to make such payment, or that the premises be sold, etc. After answer by Tarlton, and the hearing of sundry

depositions, the chancellor dismissed the bill with costs, as above stated, and the complainants brought error.

Lesesne, for the plaintiffs in error.

No counsel *contra*.

COLLIER, C. J. By the second section of the act "to prevent frauds and perjuries" it is enacted that every gift, grant, or conveyance of lands, tenements, etc., made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, etc., shall be henceforth taken as against the person or persons, etc., whose debts, suits, etc., by such guileful and covinous devices and practices as is aforesaid, shall or might be anywise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void: Aik. Dig. 207. This enactment is substantially a transcript of the statutes of the 13 and 27 Eliz., so far as the rights of creditors and purchasers are concerned, and like the former, avoids *in toto*, all conveyances made to defraud creditors, without reimbursing the fraudulent grantee to the prejudice of the creditor, the consideration he may have paid.

In *Sands et al. v. Codwise et al.*, 4 Johns. Ch. 436,¹ it was held that conveyances made to defeat creditors are void, not only by statute, but by the common law; and if void on the ground of a positive fraud they are void *ab initio*. And in *Wadsworth v. Marsh*, 9 Conn. 481, it was said that the validity of a conveyance does not depend entirely upon the consideration received, but upon the intent of the parties. Where the intent appears to have been to defraud, the conveyance is not merely voidable, but utterly void, as against the creditors of the grantor. Hence, it is frequently declared that it is not sufficient that a conveyance be upon valuable consideration, or *bona fide*. It must be both, and therefore if a conveyance be defective in either particular, though operative between the parties and their representatives, it is utterly void as to creditors: 1 Story's Eq. 346, 363; *Twyne's case*, 3 Co. 81.

In the case before us, the plaintiffs do not explicitly admit that the deed from William S. Paine is fraudulent within the meaning of the statute, but their application to equity for relief proceeds upon the idea, that their deed can not be sustained at law, because it is absolute in its terms, while it is intended merely to stand as a security for a debt not greater in amount than one fifth of the consideration expressed on its face.

1. 4 Johns. 536; S. C., 4 Am. Dec. 205.

In this view of the case, is it competent for chancery to subject the property conveyed to the payment of the plaintiffs' demand, against one who occupies the position of both creditor and purchaser? It is not pretended that there was a mistake in the drawing of the deed, or that it is in any manner different in its terms from the intention of the parties, but it is impliedly conceded that upon a trial at law, the plaintiffs could not recover. The transaction itself, showing the absence of that *bona fides*, which is essential to the validity of conveyances, intended to operate against creditors.

No case has ever come under our notice, in which relief has been afforded to a grantee, under similar circumstances. Equity, instead of being more tolerant in cases of bad faith, will look with a more searching eye, and will act upon all badges of fraud and presumptions of ill faith which are recognized at law, and even goes farther in denouncing fraud. Mr. Justice Story says, "it is by no means to be deemed a logical conclusion that because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a court of equity; for a court of equity recognizes a scrupulous good faith in transactions, which the law might not repudiate. It acts upon conscience, and does not content itself with the narrow views of legal remedial justice:" 1 Eq. 366. Without extending this course of remark further, we think it may be safely assumed that a court of chancery will not lend its aid to a grantee, so as to give him the benefit of a deed, which a court of law would consider fraudulent in fact.

The case of *Boyd and Suydam v. Dunlap et al.*, 1 Johns. Ch. 478, is entirely unlike the present. In that case, a bill was filed by the creditors, to set aside a conveyance of real and personal property, upon the allegation that it was voluntary and without consideration, and made fraudulently to defeat the creditors of the grantor. The conveyance was made from a father to a son, to whom the father was indebted in a sum equal to about two thirds of the value of the property conveyed; it also appeared, that the father told the son, on his coming of age, about five years before the conveyance was made, that he should have the whole of his property if he would stay with him and take care of his parents in their old age. The chancellor said he did not discover such traces of actual and direct fraud as warranted him in directing the conveyance of the real estate to be delivered up and canceled, as absolutely null and void." There is a marked difference between an interference actively to compel a party to re-

convey or surrender a deed, and a refusal to aid a party who seeks a specific performance of a contract. If actual fraud be not clearly and satisfactorily made out, the court may refuse its aid, but will not take so decisive a step as setting aside *in toto*, the assumed title, but will make it subservient to the equity of the case, or leave the party complaining, to his remedy at law against a contract founded on inadequacy of price, or other suspicious circumstances." Again: "A deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise, with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent."

Here was a proceeding by creditors to set aside a deed upon the allegation of fraud, but in the case at bar, the bill is filed by the grantee against creditors to set up and sustain a deed to the extent of the grantee's demand, upon the implied admission that it would be regarded at law as fraudulent, and defeated *in toto*. While the case cited rests upon familiar principles of equity, the case we are considering has no warrant, either in principle or authority, so far as our researches extend.

But it is insisted that the plaintiffs should be relieved in chancery, because a court of law would regard the deed as either good for the whole, or entirely void, and that if they failed in an action to recover possession, they would lose the entire benefit of their security. This argument has already been answered. If the deed is fraudulent in fact, no court can aid them; if it is founded upon a valuable consideration and *bona fide*, it would be evidence in an ejectment or trespass, to try titles, and until its validity has been affirmed by the verdict of a jury, the plaintiffs can not recover on it in equity; for it is a well-settled principle in that court, that a party who seeks the specific performance of a contract, must present a case free from suspicion or unfairness. This principle will apply with all force where a deed is sought to be made effectual against creditors, by suit in chancery.

We have not thought it necessary to notice the answer and proofs, as the cause in our opinion might have been dismissed for want of equity in the bill; and without adding anything further, we have only to say, that the decree must be affirmed.

EQUITY WILL NOT AID EITHER PARTY TO FRAUDULENT DEED: See *Jackson v. Marshall*, 3 Am. Dec. 695; *Chapin v. Pease*, 25 Id. 56; *James v. Bird's Adm'r*, 31 Id. 668; all of which, however, were cases where the fraudulent grantor sought relief.

KYLE v. EVANS.

[3 ALABAMA, 481.]

JUSTICE OF THE PEACE MAY BY PAROL AUTHORIZE ANOTHER TO ISSUE EXECUTION in his name, the issuance of execution being merely a ministerial act.

ERROR to Pike county circuit court, to reverse a judgment rendered in that court against a constable and his sureties, on appeal from a similar judgment pronounced by a justice of the peace, on motion, for a failure by said constable to return a certain execution. It appeared that the execution in question was issued by one Johnson in the name of the justice by whom the judgment was rendered, the justice having by parol authorized Johnson to issue the same, Johnson himself not being a justice. The defendants insisted that the execution was therefore a nullity, and requested the circuit court so to charge the jury, which the court refused, holding that the issuance of execution was a ministerial act, the performance of which could be delegated. Verdict and judgment accordingly, and the defendants brought error. There were forty-two other cases of the same kind, which it was agreed should abide the event of this.

Hopkins, for the plaintiff in error.

Harris, contra.

ORMOND, J. The amount in controversy, as well as the principle, which must govern it, and the frequency of the occurrence of the question, gives to this case considerable importance.

Judicial power must be exercised by the person in whom the trust is reposed, but acts merely ministerial in their character, may be performed by deputy. It becomes necessary, therefore, to consider in what capacity a justice of the peace acts in issuing an execution. The issuance of an execution upon a judgment, is an act purely ministerial in its character, it involves no process of reasoning or deduction from other facts, but is merely the legal consequence of the judgment previously rendered; and therefore this duty is performed by the clerk, when there is one attached to the court. A justice of the peace has no clerk, but this does not alter the character of the act; he is both judge and clerk of his own court: *Bissell v. Edwards*, 5 Day, 368 [5 Am. Dec. 166]; *Huff v. Campbell*, 1 Stew. 543.

The act of the justice in the issuance of an execution, being an act purely ministerial in its character, may be delegated to another, and will be the act of the justice. Here it is shown,

that Johnson, who issued the executions, was authorized by the justice to do so: it was therefore the act of the justice. In the cases cited from 2 Ala. 68¹ and 74,² we held that an execution from a court of record, was regular, though issued by one who was not a deputy of the clerk, if authorized by him, and if issued by one not authorized, the adoption of it afterwards by him, would make it regular. As there is no difference in the character of the act when performed by the clerk of a court of record, or by a justice of the peace, the authority of these cases seems full to the point.

It is urged, that an execution must issue under the seal of the justice, and that the authority to affix a seal, must be by deed. The law referred to is, "that all warrants or other precepts issued by a justice of the peace shall be under the hand and seal of such justice:" Aik. Dig. 292. It has never been held that this law applied to executions, but in those cases to which it does apply, it has been considered so far as relates to the seal directory merely, and that the want of a seal can not be taken advantage of: *Scott v. Rushman*, 1 Cow. 212.

The cases cited by the counsel for the plaintiff in error, from 1 Wend. 213,³ and 1 Pet. 340,⁴ merely establish the well-known proposition, that where the court has no jurisdiction to render the judgment, that its process will not protect the officer. In *Toof v. Bentley and Harris*, 5 Wend. 276, the execution was made returnable in sixty instead of ninety days, as the law required; and the court held, that as there was no authority to issue such an execution, it would afford no protection to the officer. It is obvious that the case cited has no application to this.

The case most relied on as an authority for the plaintiff in error, is *Pence v. Hubbard*, 10 Johns. 416.⁵ The facts were, that a constable, in an action of trespass against him, justified under two executions issued by a justice of the peace, the dates of which had been altered by the constable after they came to his hands; the justice testifying that he might have authorized the constable to do it, as he frequently gave constables permission to alter the dates of executions. The court held, that if the alteration in the process, in that particular case, had been made by the authority of the justice, it would not be thereby invalidated, but that a general authority to a constable to fill up or alter process, would be void, and highly improper. This

1. *McMahan v. Colclough*.

2. *McRae v. Colclough*.

3. *Gold v. Bissel*.

4. *Elliott v. Peirsol*.

5. *Pierce v. Hubbard*, 10 Johns. 406.

case, then, shows that a justice of the peace may authorize another to issue executions in his name; that he may direct or authorize a constable to do so in a particular case, but that a general authority to a constable to fill up or alter executions would be improper.

The ground of this decision appears to be the impolicy of permitting the constable, the executive officer of the justice, to alter executions issued by the justice, by virtue of a general power. That such a power in the constable would be liable to great abuse, may well be conceived, but we can not perceive that the admission of this at all militates against the proposition here maintained, that the justice may delegate the power of issuing executions to one against whom no such objection exists; and that if such authority is proved, an execution so issued will be as valid as if issued by the justice personally.

We are of opinion that the court did not err in refusing the charge asked for, and its judgment is therefore affirmed.

AUTHORITY INVOLVING JUDICIAL DISCRETION CAN NOT BE DELEGATED: See *Lyon v. Jerome*, ante, 271, and cases cited in the note thereto.

AWARD OF EXECUTION IS A JUDICIAL and not a ministerial act: *Johnson v. Ball*, 24 Am. Dec. 451. The issuance of the writ is, however, no doubt ministerial. If it be issued by the clerk, even without authority, it will be good if ratified by the execution creditor: *Clarkson v. White*, 20 Id. 229.

ARTHUR v. BROADNAX.

[3 ALABAMA, 557.]

DEFENDANT BY PLEADING TO ACTION ADMITS FILING OF DECLARATION therein.

MARRIED WOMAN TRADING AS FEME SOLE AFTER DESERTION by her husband, who has abjured the state, may sue alone on a note given to her in that character.

MARRIAGE MAY BE PROVED BY GENERAL REPUTATION and cohabitation, except in a prosecution for bigamy or an action for criminal conversation, and even then it may be proved by witnesses who were present at the marriage.

ERRONEOUS ABSTRACT INSTRUCTION is not a ground for reversing a judgment.

ERROR to Chambers county court, in an action on a note originally commenced before a justice, but appealed to the county court after judgment for the plaintiff. Plea, that the plaintiff was *feme covert*. Replication, that the plaintiff's husband had abjured the state before the note was given. On the trial of this issue the court instructed the jury as stated in the opinion.

Verdict and judgment for the plaintiff, and the defendants brought this writ of error. The principal errors assigned were the want of a declaration, and error in the instructions.

Peck and Clarke, for the plaintiffs in error.

ORMOND, J. In the case of *Wheeler v. Bullard*, 6 Por. 352, we held, that by pleading to the action, the defendant admitted that a declaration was filed. This has been repeatedly held since that decision was made, and disposes of the first and second assignments of error; as it appears from the record, that the defendant appeared and pleaded to the action.

The answer to the plea of coverture made by the plaintiff, is that her husband had abjured the state before the note was given. The court in its charge to the jury, inform them, that if they find such to be the fact, and that the husband still remains abroad; that the plaintiff has always since, traded as a *feme sole*, and that the note sued on was given to her as such, they must find for the plaintiff.

This was a correct exposition of the law: See 1 Bac. Abr. 504. In *De Gaillon v. L'Aigle*, 2 Bos. & Pul. 357,¹ it was held, that where the husband resided abroad, and the wife traded and obtained credit, as a *feme sole*, she was liable for her own debts. The same decision was made in the case of *Gregory v. Paul's Ex'r*, 15 Mass. 31. See also *Marsh v. Hutchinson*, 1 Bos. & Pul. 226.²

No question is raised upon the record, as to what facts are necessary to constitute abjuration from the state, and we must therefore presume that it was proved to the satisfaction of the court and jury.

The court also charged the jury, that the fact of marriage could not be proved but by the production of the record, and would not be established by proof of the parties having lived together as man and wife. This is certainly not the law. The general, perhaps the universal rule is, that the fact of marriage may be proved by general reputation and cohabitation, except in an action for criminal conversation, or on a trial for bigamy, and even in these cases, the fact might be proved by a witness who was present at the marriage.

But this portion of the charge, though erroneous, was wholly abstract, and could not, by possibility, prejudice the plaintiffs in error. The fact of the marriage was distinctly admitted by the pleadings, and not only was it unnecessary for the plaintiffs in error to prove the marriage, but the defendant in error was

1. 1 Bos. & Pul. 357.

2. 2 Bos. & Pul. 226.

precluded by her admission in the replication to the plea from disproving it. As, therefore, this charge, though wrong, could neither injure the plaintiffs in error nor benefit the defendant, it will, according to the established rule of this court, be disregarded.

Let the judgment of the court below be affirmed.

WIFE REGARDED AS FEME SOLE AT COMMON LAW, WHEN.—Though it is the general rule of the common law that a married woman is under an entire disability to contract as a *feme sole*, or sue or be sued as such, there are certain exceptions which are as well established as the rule itself: Clancy's Rights of Women, 54. These exceptions spring from the very nature of the disability. A married woman is not, like an infant or a lunatic, disabled to contract because of any presumed want of discretion or judgment. Her disability arises from the nature of the marriage relation, and is intended, on the one hand, to secure to the husband an undisputed right to the person and society of his wife, and, on the other, to protect the wife against any mischievous use of the power with which the husband is thus intrusted. In other words, the law will not permit the wife to enter into any personal contract, because: 1. She might, if made personally liable on her contracts, be taken in execution, and her husband thus deprived of her society; and, 2. She might by the coercion or persuasion of her husband be induced to incur obligations contrary to her own interests: Reeve's Domestic Relations, 98. If, therefore, these reasons should in any instance for any cause fail, it would undoubtedly be just and right that the rule should fail with it. Hence, come the exceptions now to be noticed. It is proper to remark, however, before entering upon a discussion of this subject, that it is not proposed in this place to treat of those cases in which a wife is regarded in equity as a *feme sole* with respect to her separate estate. That subject is discussed at some length in the note to *Thomas v. Folwell*, 30 Am. Dec. 233, and in cases and notes there referred to.

WIFE OF THE KING OF ENGLAND MAY SUE AND BE SUED as a *feme sole* at common law, as it is laid down in Co. Lit. 133 b.; Clancy's Rights of Women, 54. The reason given by Lord Coke is, that the wisdom of the common law would not have the king troubled and disquieted with private and petty causes. He is presumed to be busied with public affairs, and it will not be intended that he would stoop to marital coercion.

WIFE OF ONE WHO IS CIVILITER MORTUUS, OR BANISHED for life, or who has abjured the realm, may no doubt contract, sue, and be sued as a *feme sole*: Bac. Abr., tit. Baron and Femme, M; 2 Kent's Com. 154; Reeve's Dom. Rel. 99; Clancy's Rights of Women, 54; Schouler on Husb. and Wife, sec. 89; *Troughton's Adm'r v. Hill's Ex'r*, 2 Hayw. (N. C.) 406; *Robinson v. Reynolds*, 15 Am. Dec. 673. So the wife of a convict sentenced to transportation for a term of years, even after the expiration of his term, if he continues beyond seas, for this is to be deemed an abjuration of the realm: *Carrol v. Blencow*, 4 Esp. 27. So the wife of a convict sentenced to transportation, but remaining on prison hulks within the realm, may be declared a bankrupt where she carries on business as a *feme sole*: *Ex parte Franks*, 7 Bing. 762. The reason of the exception in these cases is plain. The husband's legal existence is extinguished or suspended for the time being: 1 Chit. Con. (11th Am. ed.) 252. He is, therefore, already deprived of his wife's society as well as of all power to control her actions, and there is a necessity that the wife should

have the ability to contract and to sue and be sued as a *feme sole*, in order that she may maintain herself: Reeve's Dom. Rel. 99.

WIFE OF AN ALIEN.—Where the wife of an alien, voluntarily abandoning her and residing constantly abroad, trades and obtains credit within the country as a *feme sole*, it is held in *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 357, that she is liable as a *feme sole* for the same reason as if she were the wife of one who had abjured the realm; but it is there said that this would not be so if she had not represented herself to be a *feme sole*. So where a foreigner has gone abroad, leaving his wife within the realm, and declaring his intention to return in a short time, but remaining abroad, his wife is liable as a *feme sole* for debts contracted by her, because the husband being an alien there is no presumption of an *animus revertendi*: *Walford v. De Pienne*, 2 Esp. 554. In *Barden v. Keverberg*, 2 Mees. & W. 61, it was held that a *feme covert* residing within the country, her husband being an alien abroad, could not be held liable as a *feme sole*, unless she represented herself to be sol.^a. In *De Wahl v. Braune*, 1 Hurlst. & N. 178, it was determined, also, that the exception did not apply to the wife of an alien enemy so as to enable her to sue alone, because the husband's rights, if he should come within the realm, would be forfeited to the crown. Martin, B., in that case observed: "An alien enemy is not *civiliter mortuus*; he is alive, but under a disability." It is well settled in the United States that a wife, abandoned by her husband or driven from his home in another state or country, and coming and residing within a state, may contract, sue, and be sued as a *feme sole* in that state, when the husband has never come into that state: *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89; *Wagg's Ex'r v. Gibbons*, 5 Ohio St. 580; *Blumenberg v. Adams*, 49 Cal. 308. See also *Robinson v. Reynolds*, 15 Am. Dec. 673, reviewing the earlier cases on this subject. So, where a married woman, whose husband was a Prussian subject and could not leave that country without a permit, had lived in New York and carried on business as a *feme sole* for seven years, it was determined that she should be treated as a *feme sole*, although the reasons of the separation of the husband and wife did not appear: *McArthur v. Bloom*, 2 Duer, 151. In giving the reasons for according to a wife the powers of a *feme sole*, where she had come and resided within the state, after being abandoned by her alien husband in the country of his domicile, Putnam, J., in *Gregory v. Paul*, 15 Mass. 31, says: "Miserable, indeed, would be the situation of those unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes, to obtain a precarious support."

WIFE OF CITIZEN SUBJECT WHO HAS DESERTED HER, leaving her without means of support, and gone abroad without having abjured the realm, it is held in England can not sue as a *feme sole*: *Bogget v. Frier*, 11 East, 301. The reason is said to be that in such a case there is a presumed *animus revertendi*: *Walford v. De Pienne*, 2 Esp. 554. So where an Englishman residing abroad in the service of his government, was compelled to give up his employment on account of war, and sent his wife and family to England, but continued to reside abroad himself to look after certain property interests, it was determined that his wife, not having represented herself to be a *feme sole*, was not liable to be sued as such: *Marsh v. Huntington*, 2 Bos. & P. 226.

In the United States also it has been held in one or two instances, that where a husband who is a citizen, has abandoned his wife and gone abroad, but is known to be alive, even though he has remained abroad for seven years or more, this is not enough of itself to give his wife the powers of a *feme sole*: *Boyce v. Owens*, 1 Hill S. C. 8. In that case it was said, in accordance with the English rule, that there must be banishment or transportation for a term of years, and non-return at the expiration of the term, or the husband must be an alien residing abroad and not intending to return. So in *Rogers v. Phillips*, 8 Ark. 366, it was held that the wife's disability was not removed unless the husband was dead in law. It was not necessary, however, to the decision of the case, to lay down any such rule, as there seems not to have been any permanent abandonment of the wife. But it is well settled in most of the states in which the question has arisen, that where a husband has deserted his wife, or driven her from home by abuse, and permanently left the state, his wife may contract, sue, and be sued as a *feme sole*: *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes*, 15 Id. 141; *Krebs v. O'Grady*, 23 Id. 726; *Clark v. Valentine*, 41 Ga. 143; *Love v. Moynahan*, 16 Ill. 277; *Prescott v. Fisher*, 22 Id. 390; *Burger v. Belsley*, 45 Id. 74; *City of Peru v. French*, 55 Id. 317; *Anderson v. Jacobson*, 66 Id. 522; *Smith v. Silence*, 4 Iowa, 321; *Ayer v. Warren*, 47 Me. 217; *Gregory v. Pierce*, 4 Met. 478; *Starrett v. Wynn*, 17 Serg. & R. 130; *Benadum v. Pratt*, 1 Ohio St. 403; *Bean v. Morgan*, 4 McCord, 148; *Rhea v. Rhenner*, 1 Pet. 105. It is true that in such a case the wife may permanently relieve herself of her disability by obtaining a divorce, but the law will not drive her to that resource, when perhaps she may entertain some hope of reclaiming her husband, or have conscientious scruples against a divorce: *Starrett v. Wynn*, 17 Serg. & R. 130. It is settled, however, that the wife can not acquire the rights and liabilities of a *feme sole* as to her contracts, unless the desertion is complete and absolute, amounting to an entire renunciation by the husband of his marital rights and relations: *Ayer v. Warren*, 47 Me. 217; *Smith v. Silence*, 4 Iowa, 321; *Gregory v. Pierce*, 4 Met. 478. In the latter case, Shaw, C. J., said: "The principle is now to be considered as establish in this state, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. * * * But, to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm."

PERMANENT ABANDONMENT OF THE STATE, or, as stated in the principal case, "abjuration" of the state, is generally regarded as a necessary element in giving a deserted wife the powers and responsibilities of a *feme sole*: *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes*, 15 Id. 141; *Krebs v. O'Grady*, 23 Id. 726; *Bell v. Bell's Adm'r*, 36 Id. 466. "Abjuring" the state is held to imply, however, merely total abandonment, and not a "renunciation of one's country upon an oath of perpetual banishment, as the term originally implied:" *Mead v. Hughes*, 15 Id. 141. Says Ormond, J., in *James v. Stewart*, 9 Id. 855: "It could not be tolerated, that the mere departure of the husband beyond the line of the state (frequently an imaginary one) should confer on

the wife the right of a *feme sole*, or expose her to its disabilities [liabilities?]. So, on the other hand, it would seem that, in our wide-spread empire, the husband might, by departure from the state, as effectually abjure the realm, for all the purposes of this question, as if he had gone into voluntary exile in a foreign country. Perhaps the true solution of the question will be a matter of fact for the jury, under all the circumstances of the case, depending not on the fact whether the husband has merely crossed the line of the state, or gone in quest of adventure, to the wilds of Oregon, but upon the intention of permanent abandonment of the wife, accompanied by departure from the state, with the design of not again returning."

Temporary desertion of the wife and abandonment of the state will not suffice: *Robinson v. Reynolds*, 15 Am. Dec. 673; *Concord Bank v. Bellis*, 10 Cush. 276. Nor even frequent and protracted absence, although the wife acts as a *feme sole*: *Rogers v. Phillips*, 8 Ark. 366; *Commonwealth v. Cullins*, 1 Mass. 116. A wife may, however, act as agent for her absent husband, and indorse, in her own name, a note taken payable to herself, and if the husband expressly or impliedly assent thereto, the indorsee gets a good title: *Krebs v. O'Grady*, 23 Ala. 726.

If the husband has not left the state, although he has abandoned his wife and lives in adultery with another woman until his death, it is held, in *Bell v. Bell's Adm'r*, 36 Ala. 466, that the husband's marital rights, nevertheless, attach, as against the surviving wife, to chattels delivered to her during coverture as her share of an estate, although the husband never had possession of them, nor claimed them, but intended that his wife should hold and enjoy them as her separate property. In Illinois, however, the language of the decisions goes to the full extent of holding, that where a wife has been deserted by her husband, or is living apart from him without fault on her part, she may contract, acquire property, sue, and be sued, as a *feme sole*, without saying anything as to absence from the state, although in most of the cases where it is so laid down, there was absence from the state: *Love v. Moynahan*, 16 Ill. 277; *Prescott v. Fisher*, 22 Id. 390; *Burger v. Belsley*, 45 Id. 74; *City of Peru v. French*, 55 Id. 317; *Anderson v. Jacobson*, 66 Id. 522. In the above-cited case of *Love v. Moynahan*, Skinner, J., thus lays down the rule: "We hold the law to be, that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent, and without expectation of again living together, and the wife is unprovided for by the husband, in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue, and be sued in relation to them, as a *feme sole*, during the continuance of such condition."

The language of the court, in *Rhea v. Rhenner*, 1 Pet. 105, also, is broad enough to cover the case of a wife whose husband has deserted her without abandoning the state, although in that case the husband had in fact gone beyond seas. There is certainly very little ground in reason for holding that a deserted wife, whose husband has left the state, should be regarded as a *feme sole*, which would not equally apply to the case of one whose husband remains within the state. Precedent is the only argument that can be urged in favor of such a distinction, after abandoning the original rule that the husband must be *civiliter mortuus* to free his wife from the disabilities of coverture as to the power to make binding contracts.

WHERE THE HUSBAND IS INSANE AND CONFINED IN AN ASYLUM IN ANOTHER STATE, it is determined in a recent case that the wife may sue alone

for a personal wrong against herself, such as slander: *Gustin v. Carpenter*, 51 Vt. 585. In that case Barrett, J., said: "We think that, to every practical intent, and upon every reason bearing on the subject, this must be regarded as endowing the wife with quite as much right to act in her own name in such a case as the present, as she would have if her husband was *civiliter mortuus*, or had abjured the realm and abandoned her."

WHERE A HUSBAND IS ABSENT FROM STATE AND IS NOT HEARD FROM for seven years, the presumption is that he is dead, and his wife may contract as a *feme sole*: *King v. Paddock*, 18 Johns. 141. But a replication to a plea of coverture, that the plaintiff's husband has been absent for seven years and not heard from, is bad, because it sets out the evidence and not the fact to be proved: *Lake v. Ruffle*, 6 Nev. & M. 684.

DIVORCE A MENSA ET THORO was held, in *Lewis v. Lee*, 3 Barn. & Cress. 291, not to render the wife liable to be sued as a *feme sole*. So a judgment on a warrant of attorney, given by a wife so circumstanced, it was held in *Faithorne v. Blaquiere*, 6 Man. & Sel. 73, must be set aside. But in *Pierce v. Burnham*, 4 Metc. 303, and *Dean v. Richmond*, 5 Pick. 461, it was determined that a wife divorced *a mensa et thoro*, and living apart from her husband, could sue and be sued as a *feme sole*. And this is the better doctrine: 2 Kent's Com. 158.

WIFE LIVING APART FROM HUSBAND UNDER ARTICLES OF AGREEMENT, with a separate maintenance, was held, in *Corbett v. Poelnitz*, 1 T. R. 5, to be capable of contracting, and suing, and being sued as a *feme sole*. But this decision was overruled in *Marshall v. Rutton*, 8 Id. 545, and it has since been regarded as settled in England, that a *feme covert*, living apart from her husband, under a voluntary agreement, can not be treated as a *feme sole*, with respect to her contracts, and sue or be sued as such, whether she has a separate maintenance or not: Reeve's Dom. Rel. (Parker and Baldwin's notes) 191, note 1; *Lord St. John v. Lady St. John*, 11 Ves. 526. The same doctrine is thoroughly established in the United States: *Parker's Ex'r v. Lambert's Ex'r*, 31 Ala. 89; *High v. Worley*, 33 Id. 196; *Fuller v. Bartlett*, 41 Ill. 241; *Turtle v. Muncy*, 2 J. J. Marsh. 82; *Brown v. Killingsworth*, 4 McCord, 429; *Freer v. Walker*, 1 Bail. 184; *Harris v. Taylor*, 3 Sneed, 536. It was held, however, in *Rose v. Bates*, 12 Mo. 30, that a wife, living apart from her husband, under articles of separation, could sue in her own name to secure her rights where her husband resided without the state.

FEME COVERT AS SOLE TRADER.—By the custom of London, "where a *feme covert* of the husband, useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning everything that toucheth the craft:" 2 Bright's Husband and Wife, 77; 2 Bish. Law of Married Women, sec. 529; 1 Chit. on Cont. (11th Am. ed.) 255. She may be sued as a sole trader in the city courts, but not, it seems, in the courts at Westminster: *Beard v. Webb*, 2 Bos. & P. 93, and her husband is said to be required to be made a co-defendant in suits against her, "for conformity:" *Lean v. Shutz*, 2 W. Bl. 1199; *Beard v. Webb*, 2 Bos. & P. 93.

A custom similar to that of London has become established in South Carolina, where it is held that the right of a wife, with the consent of her husband, to carry on a separate trade, is "sanctioned by the usage of the country and the current of judicial decisions:" *McDaniel v. Cornwell*, 1 Hill (S. C.), 428; *Sawtell v. Brailsford*, 2 Bay, 333; *Newbiggan v. Pillans*, Id. 162; *Dial v. Neuffer*, 3 Rich. 78; *Hobart v. Lemon*, Id. 131. She may be prosecuted as such trader for selling liquor to persons of color in violation of a city ordinance,

although the liquor is actually handed out by her husband: *City Council v. Van Roven*, 2 McCord, 465. A wife may be a "sole trader" in the business of keeping a boarding-house: *Dial v. Neuffer*, 3 Rich. 78; but not in the business of a carrier: *Ewart v. Nagel*, 1 McMullan, 50; nor in carrying on a farm: *McDaniel v. Cornwell*, 1 Hill, 428; nor where she supports herself apart from her husband by manual labor: *Robards v. Hutson*, 3 McCord, 475.

The doctrine that a wife may become a sole trader with the consent of her husband, in analogy to the custom of London, does not obtain in North Carolina: *McKinnon v. McDonald*, 4 Jones' Eq. 1. In New Jersey it was held in *Green v. Pallas*, 12 N. J. Eq. 267, that where a wife has been permitted by her husband to purchase goods, and give her notes for them, and to use them as her separate property, she has a right to transfer them as her separate property in payment of her notes.

EVIDENCE TO PROVE MARRIAGE IN CIVIL AND CRIMINAL CASES: See *State v. Hodgskins*, 36 Am. Dec. 742, and note.

ACTUAL OR PROBABLE INJURY FROM ERRONEOUS INSTRUCTION must appear to warrant a reversal of a judgment: *Bosley v. Chesapeake Ins. Co.*, 22 Am. Dec. 337. And generally, no error will be sufficient to warrant a reversal unless it appears that the party seeking a reversal was probably prejudiced thereby: See *Union Bank v. Planters' Bank*, 31 Id. 113; *Armstrong v. Prewitt*, 32 Id. 338; *Frankfort Bridge Co. v. Williams*, 35 Id. 155.

KENNEDY'S EX'RS v. GEDDES.

[3 ALABAMA, 581.]

ACTION LIES ON PAROL PROMISE TO ACCEPT BILL to be drawn for goods sold to another, notwithstanding the statute of frauds, though such promise does not specify the amount or date of payment, where the goods are sold accordingly, the bill drawn in a reasonable time, and acceptance refused; so where, in accordance with a usage existing in such cases, the bill is drawn payable at four months and includes interest on the price of the goods after a certain date.

PAROL EVIDENCE OF CONTENTS OF BILL OF EXCHANGE is admissible in an action against the executors of the drawee for refusing to accept it, after notice to them to produce it, though they deny having received it, where it appears to have been left with the testator and is not shown to have been returned.

INFORMALITIES IN MAKING EXECUTORS OF DECEASED DEFENDANT PARTIES are deemed waived, where, on suggestion of the death of the defendant, *scire facias* is directed to issue to his representatives, not naming them or stating whether they are executors or administrators, but they are correctly described in the *scire facias* which is duly served on them, and where, although they are not formally made parties, the judgment entry designates them as executors and recites that they appeared and went to trial.

ERROR to the Mobile county court in an action of *assumpsit* brought against Joshua Kennedy and continued against his executors, he having died pending the suit. The first count of the

declaration charged the defendant's testator as acceptor of a bill of exchange drawn by one Carpenter, in favor of the plaintiffs. The second charged in substance that the testator undertook and agreed with the plaintiffs that if they would sell and deliver to one Carpenter, certain goods, he would accept a bill of exchange to be drawn by Carpenter for the amount; that the plaintiffs, relying upon said promise, sold and delivered goods to Carpenter to a certain amount; that Carpenter thereafter drew his bill on the testator for the amount in favor of the plaintiffs, payable four months after date, but that the testator refused to accept the same. Plea, the general issue. The facts developed on the trial sufficiently appear from the opinion. Verdict and judgment for the plaintiffs, and the defendants brought error. The errors relied on are indicated in the opinion.

Stewart, for the plaintiffs in error.

Lesesne, for the defendants in error.

COLLIER, C. J. The questions now presented for decision, are essentially different from those that were considered when this cause was here at a previous term. The main question then was, "whether a verbal promise to accept a bill, not *in esse*, will, in law, amount to an acceptance." While the court recognized the principle, "that a promise, in writing, to accept a bill of exchange, not *in esse*, will be in law, an acceptance, if the bill be taken on the faith of such promise," they were of opinion, that as in this case, "it was uncertain for what amount the bill was to be drawn, when it was to be drawn, and when payable," the promise did not amount to an acceptance: 8 Port. 263 [33 Am. Dec. 289].

By taking issue upon the declaration, there was a tacit admission, that the cause of action was legally sufficient, and the questions arising at the trial, relate to the admissibility and sufficiency of the proof adduced by the parties, and the charge to the jury. But if the defendant had interposed a demurrer to either of the counts of the declaration, it would have availed him nothing. The first count is undeniably good, while it is insisted, that the second is defective, in seeking to recover upon a promise obnoxious to the statute of frauds. This objection can not be maintained by authority. In *Townsley v. Sumrall*, 2 Pet. 170, which was an action upon a promise made by the defendant, as a partner in a mercantile concern, that the firm would accept a draft, or drafts, to be drawn on them by one Waters, in favor of the plaintiff. The court was of opinion

that the action was maintainable, notwithstanding the number and amount of the bills may not have been stipulated by the parties; and that it was not a promise to answer for the debt, etc., of another within the statute of frauds, but a primary and independent engagement. So, in *Boyce and Henry v. Edwards*, 4 Pet. 122, the court say, "the distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw, may be collected from the circumstances, and extended to all bills coming fairly within the scope of the promise." See also, *Chit. on Con.*, 4th Am. ed., 348; *Chit. on Bills*, 9th Am. ed., 308, and cases there cited. Let these citations suffice to show, that the second count discloses a good cause of action in averring the promise to accept, for goods to be sold to Carpenter, the sale of the goods upon the faith of the promise, the drawing of the bill by Carpenter, and the refusal of Kennedy to accept it.

The papers offered by the defendants to impeach the credibility of the witness, Patterson, are, an account of Samuel A. Carpenter with John B. Page & Co., dated in 1833, a note of Carpenter to Joshua Kennedy, dated September 19, 1833, for the payment of three hundred and fifteen dollars and nine cents, at four months, and a bill drawn by Carpenter on Kennedy, on the sixteenth of November, 1833, for the payment to John B. Page & Co. of the sum of four hundred and ninety-four dollars and twenty-two cents, at four months date. We are unable to discover, from anything in the record, what relation these papers had to the testimony of the witness, and are consequently of opinion, that they were properly rejected by the county court, as irrelevant.

The evidence adduced by the plaintiffs, if credited by the jury, was entirely sufficient to authorize their verdict. It proves a promise, by the testator, to accept a bill for goods to be sold by the plaintiffs to Carpenter, the sale upon the faith of the promise, the drawing of the bill in a reasonable time thereafter, its presentation to Kennedy, and his refusal to accept. It was no objection to the bill, that it was payable four months after date, and that interest was added on the account after sixty days. The witness states that such was the usual course of dealing.

where accounts were of the character of that made by Carpenter, and we must intend, that the testator's promise was made in reference to the mercantile usage in such cases; the more especially as he placed his refusal to accept the bill upon grounds entirely distinct from the length of time it had to run, or the addition of interest upon the account.

But it is objected, that the bill should have been produced at the trial, or its absence more satisfactorily accounted for. It appears from the evidence, that upon its presentation to the testator, he desired it to be left with him for a few days, that he might determine whether he would accept it. It is not shown that he ever returned it, or that he was called on by the plaintiffs, or their agent, to learn his determination. The conversation, which Patterson states in his deposition, he had with the testator, appears to have taken place more than two years after the bill was left with him for acceptance. The reasonable inference then is, that the bill remained with the testator, and its non-production upon a notice to his executors authorized the admission of parol evidence of its contents.

It must be admitted that the proceedings in the county court to bring in the executors of Kennedy, are loose and informal. The death of the testator is suggested of record, and a *scire facias* directed to issue to his representatives, without stating who they are, and whether executors or administrators. A *scire facias* issued, in which Robert L. Walker and William R. Hallett are described as executors, which appears to have been duly served upon them, but without formally making them parties: the cause was tried by a jury. The statement of the case in the margin of the judgment is, "*Robert Geddes & Co. v. Joshua Kennedy's Executors.*" The entry recites, that the parties came by their attorneys, and thereupon came a jury, etc.; the judgment is, "that the plaintiffs recover against the defendants, to be levied of the goods and chattels of the said Joshua Kennedy, deceased, in the hands of William R. Hallett and Robert L. Walker, his executors, to be administered," etc. The description of the plaintiffs in error, in the *scire facias*, as executors of the original defendant, the service of that process on them, which required them to show cause why the suit should not be revived, the designation of them in the judgment, as executors, and the recital that the executors appeared and went to trial, was a waiver of all informality and equivalent to an express assent to be made defendants.

The charge to the jury, seems to us, to be entirely consistent

with the law, as we have laid it down. It obviously contemplates that the plaintiffs must have sold goods to Carpenter, upon the faith of Kennedy's promise. The charge contemplates in *totidem verbis*, the promise to accept for goods to be sold, the sale of the goods, and the refusal to accept. This, taken in connection with the evidence in the record, sufficiently shows the meaning of the court, was, that the sale of the goods should have been made in reliance upon the testator's promise for payment.

This view is decisive of the case, and the consequence is, the judgment of the county court is affirmed.

PROMISE TO ACCEPT BILL NOT IN ESSE, whether written or oral, effect of: See *Kennedy v. Geddes*, 33 Am. Dec. 289. The acceptance of bills drawn and purchased on the faith of the acceptor's letter of credit, promising to honor bills of the drawer to a certain amount, will bind the party so accepting as an absolute acceptor, and not merely as a guarantor, although drawn, with the knowledge of the purchaser, for the drawer's accommodation: *Bank of Illinois v. Sloc*, 35 Id. 223. But in *Carrollton Bank v. Tayleur*, Id. 219, it is held that a promise of acceptance of bills of exchange is not binding unless it contemplates certain specific bills, either drawn or to be drawn.

PROMISE TO PAY FOR GOODS FURNISHED TO ANOTHER, or for services performed for another, when within the statute of frauds and when not: See *Leland v. Creyon*, 10 Am. Dec. 654; *Ayer v. Hay*, 12 Id. 681; *Rhodes v. Lee*, 24 Id. 744; *Matthews v. Milton*, 26 Id. 247; *Aldrich v. Jewell*, 36 Id. 330, and cases cited in the notes to those decisions.

PAROL PROOF OF CONTENTS OF PAPER IN POSSESSION OF ADVERSE PARTY, and not produced on notice: See *McKellip v. McIlhenny*, 28 Am. Dec. 711.

ANDREWS v. ROACH.

[3 ALABAMA, 590.]

EVIDENCE OF USAGE FOR CARRIERS TO CHARGE LIGHTERAGE for transporting goods over shoals in a river when the water is so low that the carrier's boats can not pass the shoals with their cargo, is admissible in an action to recover freight, although the written bill of lading specifies the rate of freight, and says nothing as to lighterage.

ERROR to Jackson county circuit court in an action of assumpsit to recover freight and lighterage for carrying certain cotton on the plaintiffs' boat for the defendants from Cross' landing, on the Tennessee river, to New Orleans. Pleas, the general issue and set-off. The bill of lading recited the shipping of the cotton by the defendants, to be delivered to them or their assigns at New Orleans, dangers of the river excepted, they paying freight

at a specified rate. The plaintiffs offered evidence to show that during the season, when said cotton was shipped, the water was so low in the Tennessee river that the plaintiffs' boats could not pass with their cargo over the Mussel shoals, and that smaller boats were employed to lighter the defendants' cotton over the shoals, replacing it in the larger boats below, the plaintiffs paying a certain sum per bale for such lightering, and that it was the universal custom on that river for the carriers to pay the lightering fees in such cases in the first instance, and for the shippers to pay the amount to the carriers, in addition to the freight, where nothing was said about it in the bill of lading. The evidence was rejected. Verdict and judgment for the plaintiffs for a small sum, and they brought error. The question was, whether or not the court erred in rejecting the evidence above mentioned.

Robinson, for the plaintiffs in error.

Hopkins, contra.

GOLDTHWAITE, J. This case is not without difficulty, and the question which it presents is one upon which there is some conflict of authority. It is without doubt, the general rule, that when parties have entered into a written contract, its terms can not be controlled, varied, or contradicted by parol evidence; yet there are many and unquestionable exceptions to this rule. The most familiar class is negotiable securities, which are almost always construed with reference to the customs prevailing in particular places. Most of the American cases on this subject have been collated in the notes to Phillips' Evidence, by Cowen & Hill, 3d vol. 1411; but when they are all examined, it must be conceded that the multiplicity of decisions renders it exceedingly difficult to ascertain any fixed and specific rules by which the admission of such evidence is to be controlled.

In the case of *The Schooner Reeside*, 2 Sumn. 567, the attempt was made to show the existence of a custom, that packet vessels engaged in trade between New York and Boston, were not liable to pay for any damage except what should be occasioned by neglect. Judge Story sustained an exception to the proof of such a custom, as directly at variance with the contract evidenced by the bill of lading. After admitting that he is unfriendly to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, he says, the true and appropriate office

of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But he denies that it can ever be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, never in order to contradict them.

However true this may be in the main, it is certain, that with us, as well as in England, the doctrine of annexing customary incidents to contracts of particular descriptions, has long prevailed, and has been applied, not only to them, but to many other transactions of life in which known usages have been established. And it has been said these cases go upon the presumption that the parties do not mean to express in writing the whole of the contract by which they intended to be bound, but to make a contract with reference to those known usages: Parke Baron, in *Hutton v. Warren*, 1 M. & W. 486.¹

In the present case, the effect of the custom offered in evidence, was not to contradict, vary, or control that evidence by the bill of lading, but rather to show that on the occurrence of an event contemplated by neither party, when the contract was made, that certain incidents attached to it from a particular usage. The dangers of the river were excepted against, and if the low stage of the water prevented the passage of the particular class of boats employed, through the shoals, the consequence to the shipper would most usually be disastrous, and yet, if this matter was of unfrequent occurrence, it would probably never form the subject of an express stipulation.

It would be unreasonable to conclude in such a course of business, that the owner of the boat should perform that which his contract did not require him to do; and if such a custom exists as was offered in evidence, it most probably has grown up from the obvious benefit that it is to the shipper to get his cotton to market before the close of the season.

It may be remarked as applicable, and perhaps peculiar to this contract, that the boat-owner, by its terms, would have been justified, in the absence of such a custom, as was offered to

1. *Hutton v. Warren*, 1 M. & W. 486.

be proved, in not attempting to pass the shoals until enabled to do so with safety by a rise of water, and that in such a case, the injury would be great to the shipper; it is not unreasonable then to infer that this was not contemplated by the parties when the contract was made, and if not, certainly it can not be said the usage controls or contradicts that which the parties have agreed upon. The contract contemplates ordinary diligence to make the voyage; the usage applies only when circumstances call for extraordinary exertions not required by the contract.

We can not doubt that such a usage, if made out by competent evidence, is proper, and that it only annexes an incident to the contract, equally beneficial to the shipper, and obligatory upon him.

The judgment must be reversed, and the cause remanded.

EVIDENCE OF USAGE WHERE THERE IS A WRITTEN CONTRACT: See *Rager v. Atlas Ins. Co.*, 25 Am. Dec. 363; *Pavey v. Burch*, 26 Id. 682; *Boorman v. Jenkins*, 27 Id. 158; *Harris v. Carson*, 30 Id. 510; *Kendall v. Russell*, Id. 696; *Sampson v. Gazzam*, Id. 578, and cases cited in the notes thereto. In *Boon v. Steamboat Belfast*, 40 Ala. 188, the principal case is cited to the point that proof of a usage is not admissible to control a rule of law or to enlarge or restrict the clear and explicit language of a contract. See also *Sweet v. Jenkins*, 36 Am. Dec. 242, and cases cited in the note thereto.

ABERCROMBIE v. KNOX.

[3 ALABAMA, 728.]

PARTIES TO BILL ARE ALL ABSOLUTELY LIABLE AFTER DEFAULT by the acceptor and notice thereof, and the holder may proceed against one or all, at his election, until he obtains satisfaction.

SURETY CAN NOT REQUIRE CREDITOR TO EXHAUST HIS REMEDIES against the principal before resorting to the surety, except under special circumstances.

HOLDER CAN NOT BE ENJOINED FROM PROCEEDING AGAINST ACCOMMODATION INDORSER of a bill until he has exhausted his remedies against the acceptor, nor can the acceptor require him to collect the amount in equal portions from himself and the indorser, on the ground that they are both accommodation parties and co-sureties for the drawer.

ACCOMMODATION INDORSER CAN NOT HAVE BENEFIT OF JUDGMENT recovered by the holder against the drawer of a bill until he has paid the debt.

EXECUTION DEBTOR CLAIMING THAT HE HAS NOT BEEN CREDITED on the execution for a certain sum collected by garnishment from one of his debtors, can not have relief in equity unless it satisfactorily appears that the creditor is attempting to coerce payment a second time.

APPEAL from the Talladega chancery court. The bill was filed by the complainant as indorser on a certain bill of exchange drawn upon and accepted by Riddle, defendant, which had come in the regular course of business to the hands of Knox, Snodgrass & Co., also defendants. The complainant alleged that he indorsed the bill at the instance of Riddle, the acceptor, and upon his assurance that there was no risk; that the bill was not paid at maturity by the acceptor, and Knox, Snodgrass & Co., the holders, brought separate suits against all the parties; that judgment having been recovered against the drawer, the complainant applied to the holders for leave to cause the money to be made from the drawer, which they refused; that all the parties are now insolvent except the complainant and Riddle; that judgment having been obtained against the complainant and Riddle, each of them had sued out writs of error, which had been dismissed; that Riddle and his sureties in the writ of error are indemnified; and that some of the money has been collected from Riddle out of funds provided by the drawer. The complainant prayed an injunction against the enforcement of the judgment against him, as accommodation indorser, until it was ascertained that the money could not be collected from Riddle or his sureties. The defendant, Riddle, in his answer denied that he persuaded the complainant to indorse the bill, or that he was indemnified, but admitted most of the other facts. He alleged, however, in his answer, and also in a cross-bill, that he accepted the bill for the drawer's accommodation; that he had paid certain sums which had not been credited on the execution against him, and that the holders, instead of collecting the money from all the parties in equal proportions, claimed the whole amount from him. He also asked for an injunction. The answers of the holders disclaimed all knowledge as to the relations of the parties among themselves, but admitted the receipt of part of the money. What was said by them as to the complainant's application for leave to enforce the judgment against the drawer, is stated in the opinion. At the hearing, the injunctions granted at the instance of the complainant and Riddle, were dissolved, and they both appealed.

Rice, for the complainant.

B. F. Porter, for Riddle.

Cochran, for the other defendants.

ORMOND, J. There is no equity in this bill so far as it relates

to the holders of the bill of exchange, Knox & Co. The acceptor of the bill is certainly primarily liable, and the liability of the other parties to the bill, as it regards the holder, is conditioned upon his default. If at the maturity of the bill, the acceptor refuses to pay on demand, and the drawer and indorsers are duly notified of the fact, each of them becomes absolutely responsible to the holder for the amount of the bill; and he may prosecute a suit for its recovery against one or all of them, at his election, although he can have but one satisfaction.

This, it appears, he was doing, when arrested by the injunctions awarded at the instance first of the first indorser, and secondly, at the instance of the acceptor of the bill. As between the parties to the bill themselves, in adjusting their several responsibilities, the acceptor is primarily responsible for its payment, and answerable over to any party, subsequent to him on the bill, who may be compelled to pay it. It is for this reason, that every party to a bill, is in the nature of a surety, for all those whose liability on the bill is precedent to his; and therefore a valid agreement, entered into by the holder with such prior party for delay or payment, will be a discharge of the liability of all parties subsequent to him on the bill.

To produce this result, there must be an agreement on sufficient consideration, by which the holder disables himself from suing or proceeding to collect the money; the mere omission to sue or failing to sue out execution, will not have this effect. But even this pretext does not exist in this case; the holders appear to have been actively pursuing all the parties on the bill. When they attempt to coerce payment from the first indorser he meets them with the objection that they must look to the acceptor; that he is primarily responsible, and besides has a fund appropriated for the payment of the bill by the drawer; when they turn round to the acceptor, he informs them that he is a surety, as well as the first indorser, and that the money must be made in equal portions from both. Without stopping now to inquire whether an accommodation acceptor can be considered in the light of a co-surety with an accommodation indorser, without an agreement between them to that effect, it is perfectly clear that the creditor is not obliged to exhaust his remedy against the principal debtor, before he resorts to the surety, even in the case of a suretyship proper, which is not the fact here, so far as the holder of the bill is concerned. The case of *Hayes v. Ward*, 4 Johns. Ch. 123 [8 Am. Dec. 554], cited to maintain the contrary doctrine, is not an authority that way, but was decided

on the peculiar circumstances of the case, whilst the general rule is admitted to be as here laid down. The facts of that case were peculiar, and it is very clear from the reasoning of the chancellor, that he felt he was treading on doubtful ground, as he distinctly admits that there was no such general rule as is here contended for, and puts the case explicitly on the fact, that the conduct of the creditor, was such as to justify the belief, that the contract he was seeking to enforce against the surety, was invalid from usury, and that if the surety was compelled to pay, he could not recover from his principal. The amount of the decision then is, that cases may possibly exist, in which a court of chancery will interfere, and compel a creditor to proceed against the principal debtor before he resorts to the surety. No such fact exists in this case, and there is therefore no warrant for the interference of a court of chancery.

Much stress was laid in the argument on the fact, that the complainant requested the holders of the bill to permit him to run the execution against the drawer, which they declined. In the answer, one of the parties denies all knowledge of the fact; the other admits the request, and says he offered to give the complainant the control of the judgment, if he would discharge the debt by the payment of the judgment against him, otherwise he declined interfering with the matter in the hands of his attorneys. This was all the complainant had a right to ask, and all he could have obtained if he had filed a bill in chancery for that purpose.

The only fact charged in the bill, having the semblance of equity, is in the cross-bill of Riddle, where it is charged that a sum of money collected from him by garnishing one of his debtors, is not credited on the execution; but it is not stated that any attempt is making to collect the money again, or that Knox & Co. refuse to allow the credit on the execution; or that any application has been made for that purpose; and if it were conceded that the court out of which the execution issued could not afford a summary and cheap redress, there is no pretense for invoking the expensive and dilatory aid of a court of chancery, unless it appeared satisfactorily that Knox & Co. were attempting a second time to coerce payment. This is not shown by the mere fact that the credit is not entered on the execution. It will be time enough to attribute such fraudulent conduct to the plaintiff at law, when they attempt a second time to make the money, or refuse, on application, to enter the credit on the execution.

Whatever may be the rights of these parties, as between each other, as it regards the plaintiffs at law, the bill is entirely destitute of equity, and the decree of the chancellor, dissolving the injunction, is therefore affirmed.

RELEASE OF SURETY OR ACCOMMODATION INDORSEER or acceptor, by neglect to proceed against principal debtor, or other indulgence: See the cases cited in the note to *Steele v. Boyd*, 29 Am. Dec. 225; see also *Olopper v. Union Bank*, 16 Id. 294; *Lichtenthaler v. Thompson*, 15 Id. 581; *Lambert v. Sandford*, 18 Id. 149; *Okie v. Spencer*, 30 Id. 251; *Cooper v. Wilcox*, 32 Id. 695; *Commercial Bank v. French*, Id. 280; *Newell v. Hamer*, 35 Id. 415; *Brinagar v. Phillips*, 36 Id. 575, and cases cited in the notes thereto. In *Bank v. Godden*, 15 Ala. 618, the principal case is cited as authority for the general rule that a creditor does not forfeit his rights against a surety by delaying to proceed against the principal.

RIGHT OF SURETY TO REQUIRE CREDITOR TO SUE PRINCIPAL: See *King v. Baldwin*, 8 Am. Dec. 415; *Hayes v. Ward*, Id. 554; *Pain v. Packard*, 7 Id. 369; *Bruce v. Edwards*, 18 Id. 33. In *Skinner v. Barney*, 19 Ala. 701, the foregoing decision is referred to as an authority for the doctrine that equity will not, as a general rule, compel a creditor to proceed against the principal debtor before resorting to a surety.

SUBROGATION OF SURETY TO CREDITOR'S SECURITIES: See *Pott v. Nathans*, ante, 456, and cases cited in the note thereto.

CULLUM v. THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE.

[4 ALABAMA, 21.]

RIGHT OF PURCHASER OF LAND TO A GOOD TITLE is given by the law, and does not rest upon the agreement of the parties.

EQUITY WILL NOT REQUIRE PAYMENT OF PURCHASE MONEY when a pre-existing incumbrance is discovered, no conveyance having been executed.

RULE OF CAVEAT EMPTOR APPLIES TO PURCHASE OF REAL ESTATE after the conveyance has been executed and received; and the purchaser can not recover back the purchase money if paid, nor resist an action therefor, if unpaid, unless as a consequence of covenants contained in his deed.

EVICTON OR FAILURE OF TITLE does not at law constitute a defense to an action for the purchase price of lands, although the conveyance thereof contained covenants of general warranty.

FRAUD IS NOT AT LAW A DEFENSE to an action to recover the purchase price of lands, if the purchaser has accepted a conveyance, and retains possession of the land.

RELIEF IN EQUITY WILL BE GIVEN A PURCHASER OF LANDS against his obligation to pay the purchase money, if it appear that he holds under a conveyance, with covenants of warranty, that he has been evicted by title paramount, and that his grantor is insolvent.

FRAUD ON THE PART OF THE VENDOR may entitle the vendee to relief in equity, as where the former, being aware of a defect in the title, concealed

it from the latter, or suppressed an instrument by which an incumbrance had been created.

VENDOR BY OFFERING TO SELL AN ESTATE virtually represents that it is or shall be unimpaired by any act of his, and free of incumbrances created by himself.

PURCHASER IS ENTITLED TO RESCIND a contract for the sale of real estate, if such estate is taken from him in consequence of an incumbrance made by his vendor and unknown to him at the time of the purchase.

PURCHASER IS ENTITLED TO RELIEF IN EQUITY ON THE GROUND OF FRAUD, although he has taken a covenant from his vendor which covers the precise injury sustained.

NOTE HELD AS COLLATERAL SECURITY FOR A PRECEDENT DEBT is subject to the same defenses as if in the hands of the original payee.

ASSUMPSIT on a promissory note for eleven thousand eight hundred dollars, payable three years after date to S. Andrews or order, and indorsed to the Branch bank. The defendant pleaded: 1. *Non assumpsit*; 2. Fraud, covin, and misrepresentation in this, that the note was obtained in part payment of a lot in Mobile, sold by Andrews to defendant Cullum; that Andrews fraudulently represented on the sale of said lot that he had good title, and that the lot was free from all incumbrances, and especially from all incumbrances made by him, when in fact it was then subject to a mortgage of seventeen thousand one hundred dollars, made by Andrews, and by virtue of which the lot had since been sold; that on discovering the existence of the mortgage, defendant gave notice to Andrews that defendant wished to repudiate the contract of purchase, and demanded the return of the note, and offered to do all things necessary to cancel such contract; that Andrews, after receiving such notice, assigned the notes to plaintiff; that defendant never had possession of the lot, nor received any rent or benefit therefrom, and that plaintiff, on receiving the assignment, had full knowledge of all the facts and circumstances; 3. That the note was made without any consideration, and that there has been a total failure of consideration, and that the plaintiff had notice thereof, etc.; 4. That said note was given for part of the purchase price of a lot in Mobile, and the defendant required, and said Andrews gave, a conveyance with covenants of warranty, etc., against incumbrances, etc., and that such covenant had been broken, and the land had been lost to defendant by reason of a mortgage for seventeen thousand one hundred dollars, made by said Andrews, and that plaintiff had full notice, etc. Issues were joined on all the pleas. Verdict for plaintiff for the full amount. The bill of exceptions, taken and sealed on behalf of defendant, showed that the evidence at the trial

proved the sale by Andrews to defendant Cullum of a lot in Mobile for thirty thousand dollars, and the execution of a conveyance therefor with covenants of warranty against the lawful claims of all persons whomsoever; that defendant, in payment for the lot, executed one note for ten thousand six hundred dollars, due in one year, and another for eleven thousand two hundred dollars, due in two years, and the eleven thousand eight hundred dollars now sued upon; that soon after this purchase, the defendant discovered that Andrews, prior to his sale, had made a mortgage to Philip McLoskey to secure seventeen thousand dollars, and that this mortgage was duly recorded prior to the sale. The evidence also tended to show that Andrews concealed the existence of the mortgage; that defendant knew nothing of it till some time after the conveyance was made; that on discovering it, defendant offered to cancel the deed and notes; that Andrews had become insolvent and had absconded. Andrews transferred the note to Fontaine and Freeman, and they in turn transferred to plaintiff. Both transfers were made as collateral security for pre-existing debts. The lot sold was vacant. The defendant never took possession of, nor in any way intermeddled with it. The defendant had paid the first two notes given by him. The lot had been sold under the mortgage made by Andrews, and the proceeds proved insufficient to pay the mortgage debt. Instructions asked in favor of the defendant were refused. The court told the jury that no reason had been shown sufficient to prevent a recovery by Andrews himself, had he not assigned; that the recording of the mortgage was notice to all the world, and defendant was bound to know of it; and that he was bound to rely on his warranty; or that the jury might suppose that the price at which defendant purchased would authorize him to satisfy the mortgage, and complete his title. Defendant, having excepted to this charge, prosecuted a writ of error.

Stewart, for the plaintiff in error.

Campbell, for the defendant in error.

GOLDTHWAITE, J. The facts of this case, shown by the bill of exceptions, are supposed to present two prominent grounds of defense; the first arising out of the alleged fraud, and the other because of an entire failure of the consideration for which the note sued on was given. Our first examination will be of the question respecting the failure of the consideration.

1. Most generally the inducement of a purchaser in treating

for the acquisition of land, is to become its owner. We do not mean to assert that one person may not legally contract with another, who has merely the possession of the land, although his title to it may be known to be imperfect, or even bad, but our intention is to show what are the *prima facie* intendments springing out of contracts for the purchase of land, when there are no stipulations between the parties with reference to the title.

In *Ogilvie v. Foljambe*, 3 Meriv. 53, Sir William Grant says: "The right to a good title, is a right not growing out of the agreement of the parties, but which is given by law. The purchaser insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it."

Courts of equity govern their proceedings by this just rule, and when an incumbrance is discovered previously to the execution of the conveyance, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel the payment of the purchase money: Sugd. on Vend., c. 9, sec. 6, p. 315, and cases there cited.

A similar rule obtains in the courts of law, where all titles, as between the vendor and purchaser, are declared either good or bad, according as their merits may be, for there is no middle term to designate a defective title: *Romilly v. James*, 6 Taunt. 263; and every title to be marketable must be good in equity as well as at law: *Maberley v. Robbins*, 5 Id. 625.

2. Such are the rights of a purchaser when he has made no stipulations with respect to the title; but there is a period when the contract of the parties is determined by its execution on the part of the vendor, and then the rule of *caveat emptor* applies with its utmost rigor. This period is when the conveyance has been executed by all the necessary parties, and accepted by the purchaser; after this, if the purchaser is evicted by a title to which his covenants do not extend, he can not recover the purchase money, either at law or in equity: Sugd. on Vend., c. 9, sec. 6, p. 346, and cases there cited. His neglect to look into the title is then considered his own folly, for which he has no relief: Id. 347; and this rule applies equally whether the money has been paid or is only secured to be paid: Id. 349; *Thomas v. Powell*, 2 Cox, 394.

The true rule with respect to the liability of the vendor, and the obligation of vigilance imposed on the purchaser, is most appropriately stated by Mr. Fonblanque, who says, "the prin-

ciples upon which courts of law proceed upon the subject of warranty, so strongly tend to reconcile the claims of convenience with the duties of good faith, that I can not conceive the mean by which they can receive an additional extent, or be in any degree circumscribed, without endangering the interests which they are now so well calculated to preserve. To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is necessary to the intercourse of society. These objects are attained by those rules of law which require the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which can not be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to those points where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply; but even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting of good faith, *fides servanda* is the rule of law, and can scarcely be more effectually enforced in equity than it is at law:" 1 Fonb. Treat. on Eq. 362, note h.

3. We do not understand the counsel for the plaintiff in error as disputing the principles just adverted to, but rather as insisting, that, there being in this case an express warranty covering the eviction, under which Andrews would be liable to the extent of the sum agreed to be paid him by the defendant, that therefore a recovery ought not to be permitted in favor of his assignee; and the more especially that it ought not to be allowed when Andrews is shown to be insolvent, and thus unable to respond in damages.

Such a defense, whatever may be its merits, can not be called a failure of the consideration for which the notes were given, because, if there was no warranty whatever, the defendant would be without relief. It follows, that if he is now entitled to a remedy, it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable.

Without now stopping to inquire whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a legal defense, even in a case where the recovery on the covenant of warranty ought to be

equal, or larger, than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on a covenant of warranty are, in their nature, unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White and McCurdy*, 1 Ala. (N. S.) 645. Secondly, the covenant of warranty would not be extinguished by this defense. Thirdly, the covenant itself operates as an estoppel to the grantor, and would have the effect to transfer to the purchaser, or his assigns, any subsequently acquired title, which should be vested in the grantor. Fourthly, by the conveyance all covenants running with the land are, *ipso facto*, assigned to the purchaser.

This last reason, it is apparent, does not apply to this case, because the breach of covenant is a consequence of the vendor's own act, but it must so frequently apply to cases that it is decisive against the adoption of a practice which would be more like an exception than a general rule.

But independent of these reasons, the facts of this case (excluding for the present all consideration of the matter of fraud) bring it within the influence of the decision made by us in *Dunn v. White and McCurdy*, 1 Ala. (N. S.) 645, in which we held that a partial failure of consideration was not an available defense to an action for the purchase money of lands of which the purchaser retained the possession. It appears here that the defendant purchased the lot in October, 1836. The conveyance then made transferred the possession to him as absolutely, in point of law, as if he had been invested by livery of seisin: *Bliss v. Smith*, 1 Ala. (N. S.) 274. This effect is produced by the operation of our statute, similar to the English statute of uses on the conveyance: Aik. Dig. 94, sec. 37. Under this conveyance the purchaser was entitled to retain the possession until the forfeiture of the condition of the mortgage, executed previously, by Andrews to McLoskey. This forfeiture did not take place until February, 1838, when the second note secured by it was dishonored; consequently, during the interval between these periods, the defendant is entitled to the *usufruct*, and can be made responsible to no one for rents or profits in any form of action: 4 Kent's Com. 157; *Stanard v. Eldridge*, 16 Johns. 254. If the defendant was seeking a recovery against Andrews by an action on the covenant of warranty, the measure of damages would be the price agreed to be paid, or actually paid, with interest thereon, from the time at which the defendant would legally be responsible to another for *mesne profits*,

together with the cost of the ejectment suit: *Bennet v. Jenkins*, 13 Johns. 50; *Caulkins v. Harris*, 9 Id. 324; *Pitcher v. Livingston*, 4 Id. 1 [4 Am. Dec. 229]; *Staats v. Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254]; *Baldwin v. Munn*, 2 Wend. 399 [20 Am. Dec. 627]; *Wagers v. Schuyler*, 1 Id. 553.

We have not considered it important to ascertain the exact period when the lot was abandoned to McLoskey, if indeed it was so abandoned, or whether the defendant was authorized to abandon to one claiming title, without suit, for the reason (whatever may be the rights of parties with reference to this matter) that we consider the sale and possession, under the decree of foreclosure, as equivalent to a legal eviction, it being a part of the case that the defendant was a party to that suit. Nor is the circumstance that the defendant has paid the other two notes, if such is the proper inference to be drawn from the fact that he has them in possession, of sufficient importance to introduce a modification of the principles just ascertained.

The true question, so far as a court of law is concerned, being whether the defense asserted can be sustained without overstepping the boundary which divides the jurisdiction of law and equity, and not as to the amount to be recovered.

From what has been previously shown, it will be seen that all the consequences flowing from the conveyance and warranty will be the same, whether the defense is successful in whole or only in part. It is because a court of law can not do complete justice between the parties by placing them in *statu quo*, that this defense, under this aspect, is properly referable to equity jurisdiction.

4. The question of fraud is not entirely novel in this court, although it never has been presented in the same imposing manner.

In *Christian v. Scott*, Minor, 354; S. C., again before the court, 1 Stew. 490 [18 Am. Dec. 68], one of the defenses insisted on was, that the bond, the foundation of the action, was given in payment for land, to which the vendor represented he had a fair title, and that it was clear of all incumbrances. It was shown that the land was incumbered with a deed of trust, executed by the vendor to secure the payment of a sum of money due from him, and there was no evidence that the purchaser was informed or otherwise knew of it. The purchaser had taken possession of the land, and received a conveyance of it from the vendor. One of the charges requested was, that although the vendor had made fraudulent representations as to his title, yet if the purchaser received the possession, and carried the contract

into execution by taking upon himself the ownership of the land, payment of the bond could not be resisted. This court reversed the judgment of the circuit court for refusing to give this charge. By this recital it will be seen that the case was similar in all respects to this, except that here the additional fact of eviction by reason of the incumbrance is presented.

Some expressions are used by the learned judge who delivered the opinion in the subsequent case of *Wilson v. Jordan*, 3 Stew. & P. 92, from which it may be inferred that a change of opinion as to the defense had obtained in the court at that time; but when that case is examined we find the question of fraud was not involved, either in the pleadings or proofs of the cause. Indeed all inference of fraud is rebutted by the statement that it was not relied on as a defense. Independent of this, it can scarcely be supposed that the case of *Christian v. Scott*, which had been twice before the court, would be overruled without any reference to it. The course of decision ever since has been adverse to any investigation of the title, or of any defect in the estate, when the possession is retained by the purchaser, and the contract is not rescinded: *Wade v. Killough*, 3 Stew. & P. 431.

Even in contracts for the acquisition of personal property, fraud has never been admitted as a complete bar to a suit for the purchase money, unless the defendant has returned, or whenever practicable, offered to return, the purchased chattel: *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Barnes v. Bailey and Du Bard*, 2 Ala. 749, and cases there cited.

There are many distinctions between the rules which affect real and personal estates, which are distinctive features of the common law, and their ramifications extend so far that no one can clearly foresee the consequences of overturning them. Among these, not the least important are the different modes of succession after the death of the last possessor, and the different effect of covenants respecting each species of estate. If the defense of fraud was permitted in this case, to avoid a recovery at law, there is nothing in the record to show that the contract has ever been rescinded, and therefore Andrews hereafter might be liable to an action on his warranty; or in the case of a title subsequently acquired by him, be estopped by his covenant from asserting it. Many other difficulties may be supposed, which do not indeed apply to this particular case, as it is presented on the record, but which are conclusive against the admission of this defense as a general rule: Take for instance, the case of an eviction after the receipt of large rents or profits, for which the purchaser is not

responsible to the evictor; are these to remain unaccounted for, or must not the defense be denied under the influence of our previous judgment in *Dunn v. White and McCurdy*, 1 Ala. 645?

Again, a case may be stated which seems to furnish an absolute test of the unsoundness of this defense at law. In the event of the death of the purchaser before eviction, and previous to payment of the purchase money, the estate would descend to the heir, whilst the personal representative would be answerable for the debt. Which is entitled, the personal representative to defeat the action against him on the notes, or the heir to his action on the covenant of warranty?

5. This examination of principles and authorities leads us to the conclusion that the defendant has no available defense at law: but it is asked, whether it can be supposed that he is remediless, in a case where injury is so apparent? We answer that no such consequence flows from the assertion of these rules.

Assuming that the warranty was entered into in the most perfect good faith, we think relief must be given in chancery, on the ground of Andrews' insolvency, if the present holders of this note are not to be considered as its *bona fide* holders, a matter which we shall hereafter advert to.

When the defendant accepted of the covenant of warranty, it was doubtless considered as an effective security, and if he had been evicted before the payment of the purchase money, our impressions tend strongly to the propriety of not permitting Andrews himself, if insolvent, to receive that portion of the purchase money which he would be compelled to refund in an action on the warranty, though we are aware of decisions to the contrary; but however this may be, his insolvency furnishes a ground of equitable relief, entirely within the influence of the case of *Farr and Beck v. Reynolds*, 3 Ala. 521. It is useless to pursue an insolvent indorsement, but it is quite too injurious to be allowed to pay him money which he will never refund.

6. As to the defendant's relief in equity, upon the allegation of fraud, we think also there is no question, provided it is sufficiently made out by proof. Mr. Sugden says, in his *Treatise on Vendors*, c. 7, sec. 3, p. 309, that when a vendor gives a false description of the estate, the purchaser may at law rescind the contract; but this must be understood to mean only those cases where the contract is executory. To this extent and no further do the cases cited by him support his text: *Duke of Norfolk v. Westly*, 1 Camp. 337; *Fenton v. Browne*, 14 Ves. 144; *Blank v.*

Christer, 1 Salk. 128;¹ see also *Sherwood v. Salmon*, 2 Day, 123; S. C. in equity, 5 Day, 439 [5 Am. Dec. 167]; *Cottingham v. Pitts*, 9 Port. 675.²

That this is Mr. Sugden's own view of the jurisdiction, is apparent, when he subsequently says, in c. 9, sec. 6, p. 564, "although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect (of title) does not appear on the face of the title deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case, or file his bill in equity for relief." See also *Brice v. Holbeck*,³ Doug. 654; *Early v. Garrett*, 9 Barn. & Cress. 522.⁴

But the bill in chancery in most cases will be found to be a better remedy; it will lead to a better discovery of the concealment and the circumstances attending it, and may in some cases enable the court to create a trust in favor of the injured purchaser: 3 Co. Lit., H., and Butler, note 384 a. It is urged, however, that there is here no evidence of fraud, and that the purchaser either knew or is chargeable with notice of the incumbrance, because it was not only registered, but was in fact disclosed, when the title was known to come to Andrews from McLosky, who would have retained an equitable mortgage so long as the purchase money was unpaid to him. It can not be denied that the defendant was in error in not making an examination of the register, and also in not ascertaining from the previous vendor whether he pretended to any lien; but this does not exculpate the vendor.

7. In all cases of purchase there is a trust and confidence reposed by the purchaser in the vendor, that the estate is not impaired in value, or incumbered by any act done by him. Indeed, by offering to sell an estate, the vendor virtually represents it as not incumbered by himself, or, if incumbered, he will free it before the sale is executed; and if he wishes to discharge himself from the consequences of this implied representation, it lies with him to show that the purchaser was informed or otherwise knew of the incumbrance. In the case of *Harding v. Nelthorpe*, Nelson, 118, an issue was directed to ascertain whether the vendor knew of an incumbrance charged on the purchased land, but this course of proceeding in that case, shows that the in-

1. ——— v. *Christie*, 1 Salk. 28 in note.

2. *Pitts v. Cottingham*.

3. *Brice v. Holbeck*.

4. 9 Barn. & Cress. 522.

cumbrance must have been created by some other person than the vendor. The case of *Cater v. Pembroke*, 1 Bro. Ch. 301; S. C. on appeal, 2 Id. 281, also bears on this point, and we infer from it the English courts of chancery recognize the rule we have just laid down.

8. There are cases in which the mere concealment of an incumbrance, created by the grantor, may not be sufficient cause to rescind a contract, although such a concealment certainly is a breach of the good faith which ought to be observed in all contracts; but these cases rest on the principle, that no injury has been sustained by means of the incumbrance. Of this class is *Hunt v. McConnell*, 1 Mon. 219, which decided that the omission of the vendor to disclose the fact of an incumbrance created by himself, when he is not actuated by a fraudulent intention, and when the purchaser sustains no injury from it, is not a sufficient ground to rescind the contract, provided the incumbrance is removed before the hearing. But it is said the matter would assume a more imposing aspect if the incumbrance had proved injurious to the purchaser. The same doctrine was recognized in the subsequent case of *Campbell v. Whittingham*, 5 J. J. Marsh. 96 [20 Am. Dec. 241]. These cases, resting on the principle we have adverted to, have no tendency to restrict the rule declared in the leading case of *Pasley v. Freeman*, 3 T. R. 51, where it is said that the concurrence of fraud and injury is necessary to sustain an action on the case for a deceit.

There is no question here as to the injury, because the lot has been taken from the defendant in consequence of the foreclosure and sale under the mortgage, therefore, if the fact of the existence of that incumbrance was unknown to him, he is entitled in our opinion, to a rescission of the contract, whether there was or was not any fraudulent intention on the part of the vendee to work this injury to the purchaser.

9. In the case of *Edwards v. McLeay*, Cooper, 308; S. C. on appeal, 2 Swans. 287, the purchaser was held entitled to recover the purchase money with interest, from the time when he quitted the valuable occupation of the land, together with what he had expended for repairs, etc. This seems to indicate that if the occupation has been of any value to the purchaser, then the vendor, upon the rescission, would be entitled to interest on the purchase money, as a remuneration for the occupation from the time of the purchase until the offer to rescind and until the abandonment. We regret that we have not had access to the report of the case of *Small v. Atwood*, Young, 408, and the same

case on appeal to the house of lords, in which we understand all the English cases upon the rescission of contracts for the purchase of real estate are examined; as it would probably shed much light on this somewhat obscure branch of the science, and especially upon the manner in which courts of equity mete out justice to both the purchaser and vendor.

10. Without the aid of precedent to guide us, we can arrive at no other conclusion than that the purchaser has the right, when an incumbrance has been concealed from him, to require a prompt removal of it, and if this is not effected, he is entitled to seek a rescission of the contract; and may abandon the possession, unless he chooses to retain it for the purpose of charging the land with a trust to reimburse himself for money paid; nor is it under any circumstances essentially necessary that he should abandon the occupation, as the only effect of retaining it until a decree of rescission, even in cases where the occupation is of any value, will be to charge him with the interest on the purchase money. That the land may be made chargeable with such a trust is recognized in *Cater v. Pembroke*, 1 Bro. Ch., c. 301; 3 Co. Lit., H., and Butler's note, 381 a.

11. It has been argued that the purchaser has no relief in any forum for the fraud, inasmuch as he has taken a covenant from the vendor, which covers the precise injury sustained. We have examined the case of *Leonard v. Pitney*, 5 Wend. 30, where it is put with a query whether an action on the case will lie where the purchaser has accepted a deed without warranty; but independent of many cases in the books to the contrary, we consider the matter at rest in this court, in consequence of the judgment given in *Cozzins v. Whitaker*, 3 Stew. & P. 330. That was case for a deceit in the sale of a personal chattel, where there also was a warranty, but we can perceive no satisfactory reasons for any distinction to be made in the sale of lands. The case of *Cater v. Pembroke*, before cited, is satisfactory to show that a court of equity may relieve for a fraud in the sale of lands, although there is also a warranty.

12. It has also been strongly urged that this defense is but an attempt to procure relief from a hard bargain; that there is nothing to show that the defendant has paid the other notes given for the land, though he has them in his possession; and the incumbrance could and would have been discharged if the defendant in reality had paid any one of the notes: it is said furthermore, that the defendant himself could have paid off this incumbrance, and might have retained the sum paid out of that

due to Andrews. All these matters may be as supposed, and yet the right of the defendant to relief is not impaired. When the facts of this case are considered in the most favorable aspect for Andrews, he was bound at all hazards to prevent a breach of his covenant of warranty; and if he was sued for that breach, he would not be permitted to assert, or show, that the defendant might have avoided eviction, either by paying off the incumbrance, or by purchasing in an outstanding title. These were privileges which the defendant might exercise if he would, but his omission furnishes no excuse to the vendor. On the other hand, it will be quite in time for the plaintiff to show that this defense is a mere pretense, and that the defendant acquiesced in the purchase after a knowledge of the fraud, and until circumstances had rendered it desirable to avoid the purchase. Equity requires diligence and promptness in urging a rescission on the ground of fraud, and frequently presumes a waiver, or leaves the party to his remedy at law: *Hardwick v. Forbes*, 1 Bibb, 212; *Robinson v. Galbraith*,¹ 4 Id. 183; *Colyer v. Johnson*, 2 Munroe, 16.²

13. The right of the defendant to urge this defense against the present holder of the note arises out of the circumstances stated in the bill of exceptions, and these show that no new consideration was given by the bank when it acquired the property in the note, but that it was transferred to them as collateral security, to secure a precedent debt due from Andrews.

A decision on this point is not required, in consequence of the conclusions at which we have already come; but it may be said that all the authorities concur in admitting this defense under the circumstances shown in evidence.

How the law would be if it shall appear that the note is not held merely as collateral security, but that a new consideration was given by the discharge of other paper, or of other parties, by the acceptance of this note previous to its maturity, and without notice, are matters which we decline now to consider, and we only advert to them to show that these questions are not involved in this case as presented.

14. One other question remains to be considered. It is said the second and fourth pleas are supported by the evidence, and therefore it is insisted that the charge should have been given, whatever may be our opinion upon the abstract merits of these pleas. From what has been said, it will be seen the second plea is not in fact sustained, because it asserts that the defendant never

1. *Robinson v. Gilbreth*.

2. 2 Mon. (Ky.) 16.

had possession of the lot; but the fourth plea is sustained by the proof in every allegation. Neither of these pleas presents any legal defense, according to the principles we have declared.

We do not question the right of the defendant, even under such a state of defective pleading, to require the court to instruct the jury to find a verdict on the proper issue sustained by his proof, because, in that event, the plaintiff would be placed in a condition to extricate himself from the vicious plea by a motion to enter a judgment *non obstante veredicto*: Steph. on Pl. 129, and cases there cited. The defendant did not pursue this course, but asked a charge which, if given, would have led to a general verdict, and the plaintiff would, in that case, have been remediless (as under the issue of *non assumpsit*), the reason on which the verdict was founded could not have been ascertained.

We wish our decision on this point to be understood as restricted to the precise case which appears, for if a general charge is asked when all the pleas are good, we can not see clearly, how either party can be prejudiced.

We can not perceive that the defendant has been injured by the refusal to give the charge requested, or by that actually given, therefore the judgment of the county court is affirmed.

EQUITY WILL RESCIND A CONTRACT FOR THE PURCHASE OF LANDS that has been obtained through fraud, though the vendee might have resort at law to the covenants of warranty contained in his deed: *Parham v. Randolph*, 35 Am. Dec. 403. In that case it is also decided that, though the state of the title to an estate appear from the records, a misrepresentation of the vendor, with respect thereto, will nevertheless be fraudulent.

INADEQUACY OF CONSIDERATION, WHEN A DEFENSE to a suit for specific performance: *Seymour v. Delancey*, 15 Am. Dec. 303, note.

SPECIFIC PERFORMANCE OF AN AGREEMENT FOR THE SALE OF LANDS will not be enforced, where subsequent to the time that it is entered into, incumbrances are created upon the land: *Withers v. Baird*, 32 Am. Dec. 754.

FAILURE OF TITLE TO LAND SOLD, where there is neither fraud nor warranty, furnishes no ground for equitable relief against a contract for the payment of the purchase money: *Barkhamsted v. Case*, 13 Am. Dec. 92; *Dorsey v. Jackman*, 7 Id. 611. It is also true, that though there are covenants of warranty, a failure of title will not constitute a defense to an action for the purchase money: *Abbott v. Allen*, 7 Id. 554 and note; see also *Larkin v. Bank of Montgomery*, 33 Id. 324.

GREGG v. CRAWFORD.

[4 ALABAMA, 180.]

ACTION FOR NON-PERFORMANCE OF DUTY can be sustained only by the person to whom the duty was due.

DEFENDANT IN AN EXECUTION CAN NOT SUSTAIN AN ACTION against a marshal or sheriff for failure to levy the writ on the property of a co-defendant, although as between the co-defendants the latter was principal and the former surety.

CASE, by Gregg against Crawford. The latter being United States marshal, and having in his hands a writ in favor of one Robertaille and against Gregg, Botts, and Scull, returned that no property of the two last named could be found. This writ had been stayed as to Gregg, who claimed to be security for Botts. The first three counts alleged this return of *nulla bona*, and that it was false, etc. The fourth and fifth counts stated that an alias *fi. fa.* issued; that Gregg pointed out property of Botts, and demanded defendant to levy on it, and that defendant refused, and thereby plaintiff was compelled to pay the judgment. The sixth count showed that after the issue of the first execution, the defendant received a *fi. fa.* in favor of Hamilton and Cole and against Botts only, and that defendant levied upon property and gave precedence to this last writ, etc. Demurrer to complaint filed and sustained.

Lesesne, for the plaintiff in error.

Campbell, for the defendant in error.

GOLDTHWAITE, J. The plaintiff's claim to maintain his suit is presented in three aspects in his declaration: 1. He assumes that it was the defendant's duty to have levied the execution upon the property of Botts and Scull, notwithstanding the stay which was allowed to the plaintiff by the creditor; 2. He insists that the defendant should not have given the preference to the junior execution of Hamilton & Cole against Botts; 3. He claims that the defendant was bound, after notice that the plaintiff was security for Botts, to proceed and levy on his property. In each of these aspects the action is founded on the omission of the defendant to perform a duty supposed to be imposed on him by his office—but in the two first, this duty is evidently due to the creditor, and in the last, if due at all, is so to the plaintiff. With respect to all duties imposed by law, or by contract, it is perhaps the universal rule that the action can only be sustained for the omission to perform the duty, by him

to whom it is due. This will be evident when it is considered that no other person can waive its performance, or release the damages which are consequent upon the non-performance.

It can not for a moment be supposed that Robertaille, the creditor, might not have directed the defendant to return the execution in the manner which he did, without affecting his rights against the plaintiff, and if he had thus directed, the plaintiff would have no pretense of a claim against the marshal. This then is conclusive to show that the plaintiff had no rights which could be affected by the action of the defendant with respect to the first execution.

The case which is referred to, of *Whitaker v. Sumner*, 7 Pick. 551 [19 Am. Dec. 298], does not, so far as we can understand it, give the least support to the present action. There the defendant had two executions in favor of several plaintiffs, and his duty to each was so to act as to satisfy both, if practicable, and for willful, or even negligent, omission to perform this duty, he was liable to an action. But very different from this is the case of an officer who has but one execution, for in that event he owes no obligation to any person except the creditor and the debtor.

This conclusion shows that no cause of action is contained in the first three and the sixth counts.

2. The fourth and fifth counts proceed upon the idea that the defendant owed a duty to the plaintiff, under the circumstances disclosed. This duty, if it exists, arises out of one of our statutes, which is in these terms:

“When an execution may issue against any principal and security on any bill, bond, note, or other instrument, the sheriff or other officer shall levy on the property of the principal first, if he has any property in the county where the security resides: Provided, the security make oath before some justice of the peace that he is security on the said bond, bill, note, or other instrument, which affidavit shall be filed by the sheriff or other officer with the execution:” Dig. 164, sec. 24.

Whatever duties this statute may impose upon the marshal, it is clear that none are due until the affidavit is made in the manner required by its terms. There is no averment in either one of the counts that such an affidavit was made and notified to the defendant, and without such an averment there is no sufficient cause of action disclosed.

The judgment of the circuit court is affirmed.

CHILTON & PRICE v. ROBBINS, PAYNTER & Co.

[4 ALABAMA, 223.]

SURETY FULLY INDEMNIFIED BY THE PRINCIPAL DEBTOR, is not released by an extension of time given the latter.

ASSUMPSIT on a promissory note made by Chilton & Price to Robbins, Paynter & Co. The makers showed that they were sureties of one Pearson, with whom the payees had made a valid agreement to give him a year's extension of time after the note fell due. The payees showed that the sureties had obtained from Pearson a deed of trust of property ample to save them from loss arising out of the suretyship. The court charged the jury, that owing to this indemnity held by the sureties, they were not released by the extension of time given their principal. Judgment for the payees of the note. Chilton & Price prosecuted a writ of error.

Chilton, for the plaintiffs in error.

Walker and Rice, for the defendants in error.

ORMOND, J. The plaintiffs in error were doubtless discharged by the time given the principal debtor by the defendants in error, without their consent, unless the fact that they are fully indemnified by the principal debtor will prevent their availing themselves of it, and in our opinion it must have that effect.

The taking by the sureties of a deed of trust or mortgage from the principal debtor to secure them against liability, and ample for that purpose, is in effect an appropriation by them of that portion of the effects of the principal to the payment of this debt, and they will not therefore be permitted to urge that they are not responsible. The cases cited by the counsel for the defendant in error, that the taking by an indorser of an assignment of the effects of the maker as indemnity against loss upon the indorsement, is a waiver of demand and notice, or an admission of notice, are in principle quite analogous to this case. The case of *Moore v. Paine*, 12 Wend. 123, is in point. There the sureties were discharged by the act of the creditor, but being fully indemnified by the debtor, were held liable to the creditor. The court say: "The discharge of Freer (the debtor) could in no possible way interfere with their rights or liabilities so long as they held in their hands a complete indemnity against the bond, and he is not accountable to them if they are obliged to pay it."

The same principle was affirmed in the case of *Bradford v.*

Hubbard, 8 Mass. 155.¹ An accommodation indorser, who was fully indemnified by the drawer, sued the acceptor of a bill of exchange, the bill having been accepted for the accommodation of the drawer. The court recognized the principle, that an accommodation acceptor was responsible to a *bona fide* holder of a bill, although he knew the acceptance was for the accommodation of the drawer; but the court refused to permit him to recover of the acceptor, on the ground that he was fully indemnified. The language of the court is: "We consider the appropriation of the proceeds of the effects of John R. Bradford (the drawer), to the payment of the plaintiff as indorser of this bill, in the same light as if the money was in his own hands. It is so appropriated by the assignment, and the money is at the command of the plaintiff whenever he chooses to receive it."

These cases are decisive of the principle contended for by the defendants in error, and as they command our approbation, the judgment of the court below must be affirmed.

TRANSFER TO AN INDORSER by the maker of a note of property sufficient to protect him from any loss in consequence of the indorsement, will dispense with the necessity of notice to him: *Stephenson v. Primrose*, 33 Am. Dec. 281.

MEAD ET AL. v. FIGH & BLUE.

[4 ALABAMA, 279.]

RELIEF FROM A FORTHCOMING BOND CAN NOT BE OBTAINED on the ground that the levy therein recited is fictitious.

BILL in equity charging that the complainants are sureties on a delivery bond which recites a levy on a slave, and that such levy was a fiction, that the defendant in execution owned no such slave, that the bond had been returned forfeited, and that the defendant in execution had become insolvent. It appeared that the complainant Figh knew that the levy was fictitious when he signed the bond. The chancellor declared the bond void, and enjoined its enforcement. Defendants prosecuted their writ of error.

Goldthwaite, for the plaintiffs in error.

Williams, for the defendants in error

ORMOND, J. The complainants were sureties to a delivery bond, which being returned forfeited, and execution having issued

thereon, they seek to avoid the bond on the ground that the levy was fictitious, there being no such slave in existence as the one described in the bond as having been levied on by the sheriff to satisfy Mead's execution. The chancellor considered the return of the sheriff that he had levied on a slave which had no existence, as false and fraudulent, and that the forthcoming bond based on such a false levy was at least voidable.

We are not able to perceive the difference between a levy on the property of a stranger to the execution, or on property in which the defendant in execution has no interest, and a fictitious levy. In *Syme v. Montague*, 4 Har. & M. 180, it was held that the sureties to a forthcoming bond could not be relieved in equity on the ground that the defendant in execution was not the owner of the property levied on. The same principle was affirmed at the last term of this court in the case of *Jemison v. Cozzens*,¹ 8 Ala. 636, where we held, that equity could not relieve a surety to a forthcoming bond which had been returned forfeited, on the ground that the slaves there levied on were the separate property of the wife of the defendant in execution.

If it could be shown that the defendant in execution had no title to the property levied on, and therefore his sureties should be relieved against the penalty of the bond, no reason is perceived why they should not be relieved *pro tanto*, if the property was not of value sufficient to satisfy the execution, and yet it is most obvious such an inquiry would not be permitted. If it be conceded that a fictitious levy, like the present, is false and fraudulent, we are unable to see how the plaintiff in execution, who is no party to it, can be affected by it.

The law gives the defendant the right to suspend the collection of the money upon his doing certain acts, and it could not be tolerated that he should be permitted afterwards to say that these acts are not binding on him, because they assert a falsehood. His sureties can be in no better condition than he is, they are not only guarantors for the performance of the act he undertakes to perform, but must also be considered as sponsors for the truth of his declarations that such act may be performed.

We are, therefore, of opinion, that according to well-established principles, as well as on grounds of public policy, the complainants are not entitled to the relief sought by the bill. The decree of the chancellor, therefore, perpetuating the injunction prayed for in the bill is reversed, and this court, proceeding

1. *Jemison v. Cozzens*.

to render such decree as the chancellor should have rendered, hereby orders and decrees, that the bill be dismissed.

FORTHCOMING BOND CAN NOT BE AVOIDED BY SHOWING that there was no original judgment to support the execution under which the property was levied upon, for the release whereof the bond was given: *Bank of United States v. Patton*, 85 Am. Dec. 428.

PAYNE v. MAYOR AND ALDERMEN OF MOBILE.

[4 ALABAMA, 333.]

ASSIGNMENT OF A DEBT TO BECOME DUE ON THE COMPLETION of a job of work, or at the expiration of a term of service, is valid, and a garnishment thereafter made is ineffectual.

ACCEPTANCE BY THE PAYOR OF AN ASSIGNMENT OF A CLAIM is unnecessary.

IF ANSWER OF GARNISHER SHOWS THAT A THIRD PERSON CLAIMS the debt or some interest therein, such third person should be cited to appear.

PROCESS of garnishment was sued out against the defendant and a debtor of Bolling. Defendant's answer stated that before garnishment served, the mayor had accepted an assignment made by Bolling in favor of Gwathmey, for five hundred dollars, the amount of Bolling's compensation as one of the city assessors, and that the amount had since been paid. Judgment in favor of the city.

Lesesne, for the plaintiff in error.

Stewart, for the defendant in error.

ORMOND, J. Neither of the objections taken to this judgment can avail. If no debt existed at the time this garnishment was sued out, the interest of which could be transferred by Bolling to another, the objection would be equally fatal to the garnishment, which will not lie upon a possibility or contingency, but only upon a debt then due or to fall due: *Planters' and Merchants' Bank v. Andrews*, 8 Port. 404. The contract of the corporation with Bolling, was to pay him five hundred dollars for his assessment of the taxable property of a portion of the city, and although performance of the service was a condition precedent to his right to the money, we can not perceive how this can affect his right to transfer his interest before the services were rendered.

It is quite unimportant whether the mayor had the power of binding the corporation by accepting the order, or not, as it is

very clear that his refusal to accept would not have affected the right of Gwathmey to the money, which did not depend on any act of the corporation, and was only necessary to enable him to sue in his own name.

Upon this garnishment the only question was, whether Bolling had any right to this money when the garnishment was sued out, which, as the answer of the corporation disclosed, was claimed by another, he should have been cited under the recent statute of the state, passed in 1840, to contest his right with the plaintiff in attachment.

Let the judgment be affirmed.

NECESSITY OF CONSENT OF THE PAYOR to the assignment of a chose in action is necessary only where the assignment is of a part of the demand against him: *Gibson v. Cooke*, 32 Am. Dec. 194, and note.

GAZZAM ET AL. v. POYNTZ ET AL.

[4 ALABAMA, 374.]

ASSIGNMENT—DEBTOR MAY CONVEY HIS PROPERTY IN TRUST to pay his creditors in full or in unequal portions, provided he relinquishes all control over it, stipulates for no benefit for himself or family, and fairly appropriates it to the payment of his debts.

AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS INVALID if it give the trustees power, from time to time, to vary and depart from the order of settlement, and to pay in full or in part, by compromise or otherwise, the debts of the assignor, because it permits him to set his creditors at defiance, and compels them to bid against one another for the favor of being paid their debts or a part thereof.

BILL to set aside an assignment made by A. H. Gazzam. The complainants were his judgment creditors. The clauses in the assignment, on which the action of the court was based, sufficiently appear in the opinion. The chancellor decreed in favor of complainants. The defendants prosecuted their writ of error.

Dunn and Lesesne, and Dargan, for the plaintiffs in error.

Campbell, for the defendants in error.

ORMOND, J. In the case of *Ashurst v. Martin*, 9 Port. 566, we sustained an assignment made by one in failing circumstances, by the terms of which a release was exacted from all creditors who came in under the deed within a time stipulated. That decision was reluctantly made, under the influence of a former decision of this court, which had been long acquiesced in, but we then avowed our determination not to go beyond the letter

of that case. It was then considered as settled law, "that a debtor may convey his property in trust to pay one or more creditors in full, or to pay his creditors in unequal portions, provided he relinquishes all control over it, and stipulates for no pecuniary benefit to himself, but fairly and *bona fide* appropriates it to the payment of his debts." Such is still our opinion, and to that test we will subject the assignment in this case.

The parties having gone to trial on bill and answer by consent, the latter, according to the rule adopted by this court for the regulation of proceedings in the courts of chancery, must be considered as true in all its parts; and as the answers of both defendants deny all intentional fraud, and insist that those portions of the deed of assignment now objected to were introduced in it for the sole purpose of enabling the trustee, by a judicious sale of the property, to pay all the creditors, the question is one of dry law, upon the construction of the deed.

The property conveyed by the deed consists of choses in action and other personal property, lands in the city of Mobile, and a large amount of land situated in other counties, which was wild or unimproved, and which the trustee was authorized with all speed, convenient and compatible with the interest of all parties beneficially interested therein, to sell, dispose of, and convey, at such prices and on such terms or conditions as he should deem expedient, and with the proceeds and the debts collected, after paying expenses, etc., to discharge the debts enumerated in schedule B, in the precise order in which they are there enumerated, giving to the trustee a discretion to depart from the order of enumeration, "if by such departure any compromise or settlement may be effected advantageously to the interest of the party of the first part and his creditors." The second class of creditors, enumerated in schedule C, are to be paid *pari passu*; and lastly, all other legal demands. The power of the trustee is finally stated thus: "And further, that the said party of the second part may from time to time, and whenever it shall be for the mutual interest of the several parties beneficially interested herein, depart from the order of payment hereinbefore appointed and directed, by settling in full, or in part, by compromise or otherwise, any of the debts or liabilities specified in the schedule hereto annexed, or for which I am legally liable and chargeable."

We are of opinion with the chancellor, that this deed can not be supported—that there is an intent apparent on its face, that

it was made with the design to hinder and delay creditors in the collection of their debts.

A deed of assignment, to be valid, must distinctly declare the uses; and one reserving to the grantor the right to declare them subsequently, would be void. The reason of this is apparent. Whilst the debtor retains his property in his hands, subject to the legal pursuit of his creditors, he may compound with them and obtain an abatement of their claims. The parties meet on equal ground, and the creditor may either assent to the debtor's proposition or take his chance by suit. But if the debtor could, by an assignment, place his property beyond the reach of his creditors, by suit, and be at the same time permitted to compromise with them, or offer terms of compromise, the odds would be fearfully in his favor. The making of an assignment with preferences, is an admission on the part of the debtor, of inability to pay all his debts, or at least renders such payment doubtful; and those who are placed in the class of those who are to be paid *pari passu*, the true meaning of which generally proves to be not to be paid at all, naturally feel alarmed for the safety of their debts, and if the debtor through his trustee, who is a person usually not very hostile to his interests, can appeal to their fears, and offer them the certainty of receiving a portion of their debt, instead of the doubtful provision made for them in the deed for any portion of it, he would be enabled to exercise a control over them which few could resist. Even the preference given to some of the creditors would be an illusion, and they would be merely placed on the preferred list to hold out inducements to those whose chance of payment, from the position assigned them, being doubtful, if not desperate, to abate something of their demands, and thus make it, in the language of the deed, "advantageous to the interest of the party of the first part and his creditors, that a compromise or settlement should be effected." Such a provision, if tolerated, would enable a debtor to set his creditors at defiance, and compel them to bid against each other for his favors, and would be virtually vesting him with powers which no one would suppose he could in terms reserve to himself in the deed of assignment.

In the impressive language of Judge Gaston, in *Haffner v. Irwin*, 1 Ired. 490: "It is enough, perhaps more than enough, for human infirmity, that the debtor shall be allowed, under these distressing circumstances, to select, according to his unbribed judgment, among his creditors for those who merit a preference, and to make a simple and unconditional appropriation

of his property to the payment of their claims. But to allow him to negotiate for terms with them—to seek out those who will be most favorable to him, either in the way of profit or commerce, direct or indirect—to stipulate openly or covertly with regard to the property conveyed, other than its appropriation to the purposes of the conveyance—would be injurious to the best interests of the community.”

In the case of *Barnum v. Hempstead*, 7 Paige, 568, which was an assignment by a debtor giving preference to some of his creditors, but giving to the trustee a discretion to discharge certain claims against the assignor in preference to the preferred debts. The chancellor held that this provision rendered the deed void, upon the ground that an assignment which places any of the creditors in the power of the debtor, or his assignee, must have the effect to delay or hinder creditors in the collection of their debts. See also the opinion of Mr. J. Sutherland, in *Grover v. Wakeman*, 11 Wend. 203 [25 Am. Dec. 624].

We have been referred particularly to the case of *De Forest v. Bacon*, 2 Conn. 633, as supporting the view taken by the counsel for the plaintiff in error. By the deed in that case, the trustees were empowered to continue a manufactory till certain raw materials were worked up, and to purchase any necessary articles for that purpose. The court held this provision did not *per se* render the conveyance void. We are not now called on to say what discretion may be vested in the trustee in the use or sale of the property—our concern at this time is with the avails of the property when sold, and whether the trustee can be invested with a discretionary power over it. So in the case of *Ashurst v. Martin*, 9 Port. 576, we held that it did not invalidate the deed because the trustee was invested with a discretionary power as to the mode and manner of settling the trust property. But that question is totally distinct from the present inquiry.

As stated in the preceding part of this opinion, an assignment by a debtor can only be sustained where the property conveyed by the deed is, by its terms, fairly and *bona fide* devoted to the payment of the creditors, without stipulating for any benefit to the debtor, and where the equitable interest of the creditors are fixed and determined by the assignment itself. We have attempted to show that the assignment in this case is not of that character. In its results, so far is it from devoting the assigned property to the payment of the creditors, and creating in their favor direct and absolute equitable interests, that no certain interests vest in any creditor; but everything as it

regards priority of payment is referred to the discretion of the trustee, who is distinctly admonished in the deed itself to have regard in his settlements and compromises to the interest of "the party of the first part." Such a conveyance is in open hostility with the statute of frauds; its direct and necessary tendency is to hinder and delay creditors of their just and lawful actions, and is therefore fraudulent and void—the intention being apparent in the deed itself.

We are fully satisfied that the conclusion here attained, is in accordance with established principle, as ascertained by the adjudged cases, and that the decision is demanded by the best interests of the community.

Let the decree of the chancellor be affirmed.

ANY ATTEMPT AT CONTROL BY THE DEBTOR over any of his effects will render an assignment for benefit of creditors that he may have made, void. Thus, though the validity of an assignment, which exacts a release from creditors, is in general supported, it is made a condition to its validity that it be an assignment of the debtor's entire property: *Skipwith v. Cunningham*, 31 Am. Dec. 642 and note, in which other cases are cited; see also *Graves v. Roy*, 33 Id. 568.

FOSTER v. MABE.

[4 ALABAMA, 402.]

OWNER OF FREEHOLD MAY AGREE THAT A FIXTURE shall be severed from the freehold and belong to another, and after such agreement the fixture is deemed personal property.

HOUSE WHICH THE OWNER OF LAND AGREES SHALL BELONG TO ANOTHER is subject to execution against the latter.

SHERIFF'S SALE IS NOT VOID BECAUSE THE PROPERTY SOLD WAS NOT PRESENT. The sale may be set aside on that ground; but, if not set aside, is valid.

DETINUE by Mabe against Foster. One Quarles made an agreement to purchase a lot of Alexander, and erected a house and other improvements thereon. About January 1, 1841, it was agreed between Quarles and Alexander that the former was to give up his contract of purchase, but was to retain the house and do as he pleased with it. On January 20, 1841, Foster bought the house of Quarles. But as early as September 25, 1840, an execution against Quarles had been put in the sheriff's hands, and on January 22, 1841, it was levied on the house. A sale of this house under this writ was made February 8, 1841, to Mabe. The sale was made about three fourths of a mile

from the house. After the sale, Foster took the lumber out of which the house had been built. The court instructed the jury in favor of Mabe. Foster prosecuted a writ of error.

Jones, for the plaintiff in error.

Clark, for the defendant in error.

GOLDTHWAITE, J. The validity of the sheriff's sale, through which the plaintiff in the court below derived his title to the lumber sued for, is denied; and one of the objections to it is, that the house was not a chattel subject to execution.

As between Alexander, the owner of the fee, and Quarles, who was in possession under him as a purchaser, no question arises, for both of them have treated the house as mere personal property. We must then consider whether their action in this respect has the effect to determine the character of the house as real or personal estate. It is said that the law by which a trade tenant is permitted to have an interest in fixtures erected by him and attached to the freehold, is an exception to the general law, which courts have always, since the case of *Elwes v. Maw*, 3 East, 38, refused to extend beyond that class of tenants; but this, we apprehend, is not the precise question in this case, which is rather whether the owner of the fee can so deal with a fixture as to divest it of its character of real estate.

The first case bearing on this point, which is found in the books, is in 1 Ld. Raym. 182, where Treby, Chief Justice, said the question arose before him, whether the sale of lumber growing upon land, ought to be in writing under the statute of frauds, or might be by parol. And he was of opinion, and so ruled, that it might be by parol, because it is but a bare chattel. So likewise corn, or other crops, growing or sown on the grounds, which go to the executor, may be sold under a *fieri facias*: Dalton, 556, cited in Wats. on Sher. 130. In these cases it is evident that the thing sold, or subject to execution, is attached to, and if the question arose between a vendor and vendee, would be considered as a part of the freehold, and pass with it; but in the first case put, of the timber, the act of the party had reference to its severance from the land; and in the last, of the growing crops, this same consequence was in view from the time of planting. In both the intention of severance determines the character of the thing. The same idea is very fully illustrated by some of the decisions under the statute of frauds in those cases, where the question, whether an interest in lands has been sold so as to require the sale to be evidenced by writing.

The sale of a growing crop was formerly considered in England as conveying an interest in the soil by which it was to be nurtured and matured: *Crosby v. Wadsworth*, 6 East, 602; *Emmerson v. Heelis*, 2 Taunt. 88. But when the crop has ceased to grow, and is at maturity, a different rule is supposed to govern: *Parker v. Staniland*, 11 East, 362. And in this last cited case the true rule is adverted to, though not distinctly set out—that an immediate severance from the land of the article grown was in contemplation of the parties.

The sale by a landlord to his tenant of fixtures attached to the estate, and *vice versa*, has never been considered as within the statute. *Hallen v. Runder*,¹ 3 Tyr. 959, cited Gib. on Fixt. 48. And it is evident that these decisions could never have been regarded as correct in principle upon any other ground than that the fixtures, by the agreement of the parties, were treated as chattels, with a view to an ultimate severance from the freehold. Many other decisions, analogous in principle, it is supposed, might be found in the English reports, but these are amply sufficient to show, that where a matter connected with the freehold is a personal chattel when severed, it may be treated as such whenever either the law or the agreement of the parties contemplate an actual severance. A case more strongly illustrative of the rule than any of the English decisions, is *Bostwick v. Leach*, 3 Day, 476, where an agreement to purchase the millstones, running gear, and other fixtures, then attached to a mill, was considered as an agreement for the sale of chattels, and therefore not within the statute. It is there said: “When there is a sale of property which would pass by a deed of land as such, without any other description, if it can be separated from the freehold, and by the contract is to be so separated, such contract is not within the statute.”

Such are the contracts for the purchase of gravel, stone, timber, trees, and the boards and bricks of houses, to be pulled down and carried away.

In the case before us, it is not expressly stated that Quarles was to remove the house immediately after the purchase (for such we consider it) from Alexander; but the inference is warranted that a removal within a convenient time was contemplated by both parties. The moment that Alexander consented that Quarles should do as he pleased with it, the house became a personal chattel, and was consequently subject to levy and sale as the property of Quarles, under the execution of Hines.

1. *Hallen v. Runder*.

2. The other question is one of less difficulty, and is in some degree within the influence of previous decisions of this court. It is supposed the sale was void because the property was not present at the time and place of sale. Nothing is more clear than the duty of the sheriff to have the property present at the time and place of sale; and the reason is obvious—he is directed to sell the property at public vendue, and to be sold well, it should be exhibited; but this is a matter which concerns no one but the defendant in execution, or possibly some other execution creditor. And the first, and probably the other likewise, may set aside an irregular sale on timely application to the court from which the execution issued, as was done in the case of *The Mobile Cotton Press v. Moore and Magee*, 9 Port. 696. The course of proceeding there indicated is sufficient to preserve the rights of the parties from invasion by an irregular sale. The case of *Brown v. Lipscomb*, Id. 472, establishes that when property is sold by a trustee, which is held adversely at the time of sale, nothing passes to the purchaser, because in such a case, the attempt to sell is against public policy, as a right of action only is then vested in the trustee. In other respects, this case sustains the doctrine that a stranger, or one claiming by a title subordinate to the trustee, can not avail himself of an irregularity in the sale. The case of *Ware v. Bradford*, 2 Ala. 676 [36 Am. Dec. 427], determines that the defendant in execution can not collaterally impeach the regularity of a sheriff's deed of land. The same was held as to personal property in *Fournier v. Curry*,¹ at this term. These cases are considered as conclusive of the present case on this point; and we may further add, that there is no reason applicable to sales of real estate, which will not apply with the same force to sales of personal chattels, except only where there is an adverse possession, which does not affect the former, but will avoid the latter.

By the levy the sheriff had obtained all the possession he could without removing the house, and we must presume, in the absence of any evidence to the contrary, that he invested Mabe with it. This made the title of the latter complete against every one claiming under the defendant in execution, until the sale was set aside by the court from which the execution issued.

We have omitted all examination of the authorities cited from New York to show that a sale of this description is void, because, if such is the law in that state, it could have no influence to change our decision, for the reason that our own system must

1. 4 Ala. 821.

govern, and harmony ought to prevail between the decisions applicable to real and those of personal estate.

Our conclusion is, that there is no error; and the judgment is therefore affirmed.

BUILDING ERECTED ON ANOTHER'S LANDS, with his consent, belongs to the person who erected it, and not to the owner of the land: *Russell v. Richards*, 26 Am. Dec. 532, and note 539, in which cases in this series and elsewhere to the same effect are collected.

WOODWARD v. HARBIN.

[4 ALABAMA, 534.]

AMENDMENT OF SHERIFF'S RETURN SO AS TO SHOW NO PROPERTY FOUND may be made, and when made relates back to the time when the process was returned, and authorizes proceedings against indorsees under the statute of Alabama.

THERE IS NO PRESUMPTION THAT A SHERIFF RETURNED A WRIT at any time prior to the date when the law required him to do so.

THE GENERAL ISSUE IS SUFFICIENT IN AN ACTION BY AN INDORSEE against an indorser to put in issue the allegation that execution had been returned, no property found before the suit was commenced. A plea in abatement is not required in such case.

ASSUMPSIT against Woodward as indorser of a promissory note made by Ewing to Woodward. Judgment had been recovered against Ewing in 1837. In October, 1837, execution issued to the sheriff. He returned it *nulla bona*. Long after the commencement of this suit he amended the return so as to read, "no property found." At the trial, the defendant demurred to the evidence, because the return did not show "no property found" when the suit was commenced, and because the execution was returnable on the first Monday after the fourth in March, 1838, and the return does not show that it was made before that day, while the present action was brought eight days before the time at which the writ was required to be returned. The demurrer to the evidence was overruled, and judgment given for plaintiff. Defendant sued out a writ of error.

W. P. Chilton and Stone, for the plaintiff in error.

Moody and Storrs, for the defendant in error.

COLLIER, C. J. By the second section of the act of 1828, "defining the liability of indorsers, and for other purposes," as explained by the act of 1829, it is enacted, that where any contract in writing, for the payment of money, etc., save and ex-

cept such as is governed by the law merchant, shall be assigned, suit thereon shall be brought to the first court of the county where the maker resides, to which the writ can properly be made returnable. And further, that when a judgment shall be recovered on any assigned or indorsed note, etc., and a writ of *feri facias* shall be returned by the proper officer, "no property found," the assignee or indorsee may commence his action against the assignor or indorser, on the assignment or indorsement, and the return on the *feri facias* shall be sufficient evidence of the insolvency of the maker, etc., to authorize a recovery against him: Aik. Dig. 330.

It is argued for the plaintiff in error, that although, in ordinary cases, it is competent for a sheriff to amend his return upon process, so as to make it speak the truth, and his return, when amended, may relate back to the time when it should have been made, yet the amendment in the present case can not have a retrospective relationship, because the statute makes the return of "no property found" a prerequisite to the liability of the indorser. This argument can not be maintained. "Such a return is required by the statute as a means of proving the inability of the maker to pay the paper indorsed, and when made is conclusive to that point; but it is not less amendable *nunc pro tunc*, than is the return of a sheriff to original or final process." That the latter may be amended, even after judgment rendered and a writ of error sued out, has been repeatedly adjudged; and when thus amended, the proceedings are legalized by relation.

In order to charge special bail by *scire facias*, the law requires that a *capias ad satisfaciendum* shall be issued on the judgment recovered against the principal and returned *non est inventus*, yet it has been held that a sheriff who had the *ca. sa.* in his hands before the issuance of the *sci. fa.*, and returned it to the proper depository, might after the latter writ had issued, indorse thereon his return of *non est inventus*. Such was the decision in *Mahurin v. Brackett*, 5 N. H. 9. In that case the court say: "It has been argued on the part of the defendant in this case, that the omission to make the return of *non est inventus*, discharged the bail, because his liability depended upon such a return. But the liability of bail is founded not upon the return, but upon the breach of a contract, that the principal shall not avoid. It is true that bail can not be charged without such a return, but this is because the statute has made a return the admissible evidence of the avoidance. The omission to make the

return, then, in this case, left no defect in the essential grounds of the liability of the bail, but a defect in the proof. And we think the officer was properly permitted in the court below, to supply this defect, by an amendment of his return." A similar decision has been made in Kentucky: *Malone, Chiles & Co. v. Samuel*, 3 A. K. Marsh. 350 [13 Am. Dec. 172]. There the court say: "The amendment made, must, we think, have relation to the time when the process was returned." These cases are strikingly analogous in principle to the one at bar, and are sustained by reasoning so cogent as to relieve us from a further examination of the first point in the cause. See also *Smith v. Daniel's Ex'rs*, 3 Mur. 128.

2. By a statute of this state, it is made the duty of sheriffs "to return all writs and executions to the clerk's office from which they shall issue, at least three days previously to the term of the court, to which they shall be returnable:" Aik. Dig. 279. Under this act, it has been held, that although a sheriff is not bound to return an execution at a day earlier than it directs, yet he may at any time after its receipt return "no property found," and that such return will be evidence for an indorsee in an action against an indorser: *Reese v. White*, at last term.

Neither the first nor amended return of the sheriff of Lowndes shows on what day the execution was returned, and no extrinsic proof was adduced to this point. The evidence adduced at the trial on the part of the plaintiff was demurred to, and the court were authorized to make every presumption against the party demurring, which a jury could legitimately have made.

It is clear from the evidence in this cause, compared with the date of the writ, that the present action was brought at least eight days previous to the term when the execution against Ewing was returnable. The natural inference from this state of fact, and the only one which it seems to us could have been fairly made by the jury, is, that the sheriff of Lowndes returned the execution at the time he was required by law to do so. Such a return would be most usual and regular, and one made on an earlier day would have been made on the sheriff's responsibility, and might possibly subject him to damages; especially if it should appear that the defendant in execution had property in his possession between the time of such return and the regular return day.

The reasonable inference, from the want of precise proof on this point, being such as we have stated, notwithstanding the defendant admitted by his demurrer, not only the facts proved,

but all fair and legitimate deductions from them, he can not be held to have admitted a fact not proved, and which can not be legitimately deduced from the evidence.

But it was argued for the defendant in error, that the pleas on which issues were submitted to the jury being in bar, an objection that the suit was brought before the return of the execution could not have been entertained—had the plaintiff in error desired to object, that the action was prematurely brought, he should have pleaded in abatement. To sustain this argument, the case of *Jones v. Yarborough*,¹ at this term, has been cited. That was an action of assumpsit on a promissory note, to which the defendant, among other pleas in bar, pleaded the general issue. The writ bore test a few days previous to the maturity of the note, but the declaration correctly described the note, and it was only by a reference to the writ that the objection was discovered. We held, that the defendant having pleaded in bar of the cause of action alleged in the declaration, his pleas would not allow him to defeat a recovery by showing that the suit was brought before the cause of action accrued, that the pleas admitted the regularity of the proceedings. In the case at bar, the declaration necessarily puts in issue the issuance and return of the execution against the maker of the note, before the commencement of the action. Proof of that fact was indispensable to the plaintiff's right of recovery under the state of the pleadings, which expressly negatived it. The case cited then, is unlike the present, both in its facts and the principle on which it rests, and the argument attempted to be supported by it can not be maintained.

There being, then, an entire absence of proof to show that the execution against the maker of the note was returned before this suit was brought, or anything in the record to warrant such a conclusion, the demurrer to the evidence should have been sustained by the circuit court. The consequence is, its judgment is reversed and the cause remanded.

AMENDMENT OF SHERIFF'S RETURN relates back to the time of the original return: *Malone v. Samuel*, 13 Am. Dec. 172 and note, in which the subject of amendments to returns is examined.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

SAYRE v. CRAIG.

[4 ARKANSAS, 10.]

COVENANTS ARE INDEPENDENT, if by their terms the time of performance of one is so fixed, that it is to happen, or may happen, before the performance of the other. Thus if a day certain is fixed for the payment of money, but no day is mentioned for the execution of the conveyance of which it is the consideration, an action may be maintained for the money, though the deed has not been executed, and though there has been a demand made for it.

WHERE A COVENANT goes only to a part of the consideration of another covenant, and its non-performance may be paid for in damages, the latter covenant is independent thereof, and an action may be maintained thereon without averring performance of the first.

COVENANT. An agreement under seal, entered into between the parties to this action on the twenty-first of September, 1839, witnessed that Sayre thereby sold and agreed to convey to Craig, by deed, with general warranty, a certain tract of land for thirteen thousand nine hundred and forty-seven dollars and thirty-six cents, whereof eight thousand nine hundred and forty-seven dollars and thirty-six cents was to become due and payable in March, 1840, and the balance in February, 1841. The agreement further provided that to secure these payments Craig should deliver to Sayre bills of exchange drawn by James Erwin upon Craig and accepted by him. The declaration alleged that Sayre had always been willing and ready to convey, and that he had put Craig in possession. The breach alleged was the non-payment of the first installment of the purchase

money when it became due. Defendant averred that before the first installment of the purchase money became due, plaintiff accepted from him a payment on account thereof; that at the time that he made this part payment he presented to Sayre a set of bills of exchange, for the remaining balance of the installment of the kind provided for in the agreement, and also a set of bills for the amount of the last installment, and that at the time that he presented these bills to Sayre, he made a request upon him, that he perform his part of the covenant by the execution of a conveyance, which request was refused by Sayre. Defendant averred his willingness to pay the amount due upon the execution by Sayre of the deed. Plaintiff demurred to this plea. This demurrer was overruled, and judgment below was given for defendant.

Pike, for the plaintiff.

Ashley and Watkins, contra.

By Court, LACY, J. The question here to be decided turns upon the proper construction to be put upon the covenants or promises of the respective parties to the contract in this suit. It is evident, if the covenants are dependent, that the declaration is bad; and if independent, that it is good, and the breaches well assigned. It is true, as contended, that there is a strong inclination of the courts, in modern cases, to favor the doctrine of dependent covenants, such construction being obviously most just, and tending to prevent a multiplicity of suits. Still, where the parties by the nature and terms of their contract, clearly show that each intended to look to his own part of the agreement, and to rely upon the remedy it afforded, in such cases the performance of the covenant of the one has no reference to that of the other; and hence the courts are not at liberty, upon such mutual agreements, to make one depend upon the other, but they are bound to construe them separately and independent of each other. The rules upon this subject are accurately stated by Sergeant Williams, in his learned note to the case of *Pordage v. Cole*, 1 Saund. 319, in which the English authorities are collated and reviewed. "If," says he, "a day be appointed for payment in full or in part, or for doing any other act, and the day is to happen before the thing which is the consideration of the money, or the act which is to be performed, an action will lie for the money, or for not doing such other act before performance; for in such case it appears that the party relied upon his remedy, and did not intend to make

the performance a condition precedent. And so it is where no time is fixed for the performance of that which is the consideration of the money or other act: *Dyer*, 76, a, in margin; *Thorpe v. Thorpe*, 1 Salk. 171; S. C., 1 Ld. Raym. 665; 1 Lutw. 250. And this was the ground upon which the judgment in that case rests, for the money was to be paid in that case upon a given day, which might happen before the lands were or could be conveyed. Another rule laid down is, that where a covenant goes to only a part of the consideration, and a breach of such covenant may be had in damages, it is an independent undertaking, and an action may be maintained for a breach of the covenant, without averring performance. And in support of this rule, it is decided in the court of king's bench, East, 17 Geo. III., *Boone v. Eyre*,¹ that where a party conveyed an equity of redemption to a plantation, together with a stock of negroes upon it, in consideration of a given sum and an annuity for life, and covenanted that he had good title, the breach assigned was, the non-payment of the annuity, and the plea denied that he was possessed of a valid title to the slaves, and so had no authority to convey. The plea was adjudged bad, and the court added, if the plea were allowed, then that a failure of any part of the consideration would defeat the action: *Campbell v. Jones*, 6 T. R. 570. The reason given for the decision is, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should be permitted to enjoy the part he had without paying for it. The same doctrine is fully recognized in all the American authorities upon the point. And the reason that mutual promises will bear an action without an allegation of performance, is, that the law binds every man to perform his contract according to its true intent and effect. He makes his bargain, and relies upon the other's covenant for performance. In such case, it needs no averment of performance on either side to maintain the action. But if it appear that either party was to have the thing done before performance on the other part, then performance, or a readiness to perform, must be averred. In *Jones v. Barkley*, Doug. 684, Lord Mansfield remarks that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, however transposed they might be in the deed. Their precedence must depend upon the order of time in which the intent of the transaction required their performance: *Cunning-*

ham v. Morrell, 10 Johns. 204 [6 Am. Dec. 232]; *Robb v. Montgomery*, 20 Id. 15.

The same doctrine is established in *Gardinier v. Cusan*,¹ 15 Mass. 501. The application of these principles to the case now under consideration, proves conclusively that the mutual covenants of the respective parties are independent undertakings, and therefore there was no necessity to aver, in the declaration, performance or readiness to perform.

Sayre sold and agreed to convey to Craig, by deed, with general warranty, a tract of land described in the covenant; and in consideration of this sale, Craig bound himself to pay the purchase money in two different installments, the first to become due in March, 1840, and the second in February, 1841; and to secure these payments, he was to deliver to Sayre bills of exchange, to be drawn by Erwin and accepted by himself, payable in New Orleans. Possession was to be delivered to Craig upon the first of January, 1840; and the contract was entered into on the twenty-first of September, 1839. From these facts, it is perfectly evident that Sayre had a right to demand the bills upon the execution of the contract, and that Craig had an equal simultaneous right to demand a conveyance. The right of neither depended upon the performance of a condition precedent. Craig agreed to accept and take Sayre's covenant title; and Sayre was bound to convey and look to Craig's personal obligation alone for the purchase money, and to accept the bills of exchange, if tendered in conformity with the agreement to secure the payment of the purchase money. Their covenants were independent of each other, and each relied upon his own part of the agreement for their performance, and the respective obligations were due presently, and attached immediately upon the execution of the deed.

By the terms of the contract, the money was to be paid upon a day certain, which was to happen or might happen before making the conveyance, and part of the consideration was executed by delivering possession; and both these facts bring the agreement within the operation of the rules above stated. The same principle holds good where a day certain is fixed for the payment, and no day certain fixed for the performance, which is exactly the case in the present instance. And so the point was determined in *Cunningham v. Morrell*, 10 Johns. 204 [6 Am. Dec. 232], and in *Thorp v. Thorp*, 12 Mod. 455.

If these positions be true, then it follows that the declaration

1. *Gardinier v. Cusan*.

is good, and the breach well laid. It consists in the averment of the non-payment of the purchase money on the first installment, when it fell due. This the plea neither admits nor denies, but seeks to avoid and bar, by alleging the payment of about a thousand dollars on the first installment, before it was due, and the tender of bills of exchange for the residue of the purchase money due on the first installment, and all the last, which it states was refused. This is tendering the plaintiff an immaterial matter, which he was not bound to take issue upon. The foundation of the action is the non-payment of the purchase money, and the plea is no answer to that charge. The bills of exchange to be drawn by Erwin and accepted by Craig, were intended, as expressed in the covenant, as collateral security to secure the payment of the purchase money. Sayre had a right to the bills, and Craig was bound to present them. But the cause of action arises out of the non-payment of the first installment, and the plea, by not traversing this fact, must be adjudged insufficient: consequently the court erred in overruling the demurrer to it.

Judgment reversed.

COVENANTS WHEN INDEPENDENT: See *Babcock v. Wilson*, 35 Am. Dec. 263; *Howe v. Mitchell*, Id. 231, and cases cited in note.

McFARLAND v. STATE BANK.

[4 ARKANSAS, 44.]

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES upon all questions involving the construction of the constitution of the general government, the acts of congress and foreign treaties made in pursuance of its authority, are binding upon and will be followed by this court.

NOTES ISSUED BY A BANK ARE NOT "BILLS OF CREDIT," within the prohibition contained in the national constitution against the emission of such bills, by the respective states, though the state is the sole stockholder in the bank, and has unlimited control over its affairs through its legislature, and though it has made the notes of the bank receivable in payment of taxes.

PLEA OF USURY IS DEFECTIVE if it do not allege a corrupt agreement upon the part of the lender to take more interest than the law allows.

DEBT upon bond for two hundred and fifty-five dollars, executed to the State bank by defendants. One of the pleas interposed was, that the consideration of the bond was the loan of notes of the bank which, it was alleged, were unconstitutional and void. A demurrer to this plea, and also to a plea of usury

interposed, was sustained; a plea of *non est factum*, not sworn to, was disregarded, and judgment was entered for the plaintiff. Defendant sued out a writ of error.

W. Byers and Linton, for the plaintiffs in error.

Hempstead and Johnson, contra.

By Court, LACY, J. The facts stated in the record present, at the outset, the question of the constitutionality of the act of the legislature incorporating the bank of the state of Arkansas. On the part of the plaintiffs in error, it is contended that this law is repugnant to that clause of the constitution of the United States, which declares that "no state shall emit bills of credit." For the defendant, it is said, that the issues of the bank paper are not bills of credit, within the meaning of the constitution, and therefore they are not included within its prohibition. The meaning of the term "bill of credit" has been defined and settled by the supreme court of the United States. We regret to be compelled to add, that a different interpretation has been given to the term, by that distinguished tribunal, upon two separate occasions, and that wholly dissimilar and contradictory principles have been deduced from their exposition. The question was first brought before that court, upon error, in the case of *Craig et al. v. The State of Missouri*, reported in 4 Pet. 330;¹ and the court, in laying down the doctrine upon the subject, holds that the term "bills of credit," in their enlarged and perhaps literal sense, comprehends any instrument by which a state engages to pay money at a future day. It is conceded on all hands, that the clause in question was inserted in the constitution for the purpose of preventing the state governments from creating a paper medium to circulate as money. The excessive issues of such a currency, both by the colonies and continental congress, prior to and during the time of our revolutionary struggle, was the mischief intended to be remedied. And it may be remarked, that it is among the most extraordinary and memorable events recorded in history, that we should have been able to have achieved our national independence amidst a worthless and depreciated paper currency, and that the wide-spread and deep ruin that followed from this state of things, was one of the principal causes that led to the formation and adoption of the federal constitution.

It is said that the language of the instrument itself, as well as the mischief designed to be remedied, restricts the term

1. 4 Pet. 410.

“bill of credit,” and makes it signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society; and that the prohibition was inserted to cut up by the roots the emission of paper money by state governments. That the word “emit” conveys to the mind the idea of issuing paper, intended to circulate as money, redeemable at a future day; and that, therefore, the objection that this definition would include all kinds of issues or engagements, by which a state contracts a loan on her credit, or in anticipation of a revenue, or agrees to pay money for services actually rendered, is not well founded. In such cases, it is said, that a *bona fide* engagement to borrow money upon the faith of the state, or to pay it on a valuable consideration rendered by services, is a wholly different and distinct thing from issuing a paper currency to circulate as money; that the constitution itself forbids the conclusion, that making bills of credit a tender in payment of debt, constitutes an essential quality of such paper emissions: that the same clause of the instrument that interdicts a state in emitting bills of credit, enacts that nothing but gold and silver shall be made a lawful tender in payment of debts. To say that paper issues are not bills of credit, unless by the act creating them they are made a tender, is in effect to expunge this latter distinct and independent prohibition: that while tender laws, enforcing their reception, was one and probably the greatest evil intended to be remedied, still there were others that fully justified the constitutional enactment, and they are embraced in its provisions; and that this position was proven by the history of the times; for bills of credit were first made a tender by an act of the Virginia legislature in 1777, and that in the year 1781, she enforced as a tender, by statutory regulations, the legality of the paper emissions of the continental congress. That both prior to those periods and subsequent to them, there were large amounts of paper money issued, without being made a tender; and that they were all redeemable upon a real or supposed fund, provided for that purpose; and some made payable on demand, in gold and silver. Still, these issues were ever held to be bills of credit; and that this is the case, whether issued directly in the name of the state, or indirectly by her authority, and whether with or without a fund for their redemption, the state being the sole and legal owner of such issues.

The application of these principles induced the court to declare the law of Missouri, creating loan office certificates, to be uncon-

stitutional and void. These certificates were issued in the name and by the authority of the state; a fund was provided for their redemption; and they were made receivable for all public dues, and in payment of the charges of the state. They were signed by the auditor and treasurer, and were issued in notes from ten dollars to fifty cents. The court considered and determined that they were bills of credit, in the proper constitutional sense of that term; for they were issued by a state, as negotiable paper, designed to pass as a currency, and to circulate as money. When the case of *Craig et al. v. The State of Missouri* was decided in 1830, there were only seven judges upon the bench. Four concurred in the opinion which Chief Justice Marshall then delivered; and three denied the doctrine then laid down and settled, and each of them delivered a separate opinion against its authority.

The same question was again brought up, on error to a judgment of the court of appeals of Kentucky, in the case of *Briscoe v. The Commonwealth Bank*,¹ of that state. The writ was sued out about the year 1832, and the cause removed to the supreme court. When it came on first to be heard, Judge Story remarks, that it was the opinion of a majority of that court that the act of Kentucky establishing the Commonwealth bank was unconstitutional and void, being repugnant to that clause in the constitution which forbids a state to emit bills of credit. From some cause or other, the opinion was held up, and the cause was ordered to be reargued, and was finally settled, at the January term, 1838, in favor of the constitutionality of the act of the Kentucky legislature. Before the opinion was delivered in this cause, the number of the judges of the supreme court had been increased, by an act of congress, to nine members; and death had removed several of those from the scene of their usefulness and great labors, who heard and determined the point in the case of *Craig et al. v. The State of Missouri*; and among these was Chief Justice Marshall, a name ever to be held in respect and reverence. The opinion in the case of *Briscoe v. The Commonwealth Bank of Kentucky* was delivered by Justice McLean, and all the judges then present, except Justice Story, seem to have concurred in the reasons and principles stated. He dissented, and, in an argument of singular ability and learning, nobly vindicated the memory of his illustrious friend, the late and lamented chief justice, from the imputation of rashness or a want of deep reflection.

1. 7 J. J. Marsh. 849.

The *Case of the Commonwealth Bank*, reported 11 Pet. 311, is attempted to be distinguished from, and taken out of the rule insisted on in *Craig et al. v. The State of Missouri*. But, like Justice Story, we believe that the two cases stand precisely on the same ground, and turn expressly upon the same principle. If the first decision was right, the latter must be wrong; and the reverse of the proposition is equally true. The principal grounds stated and relied on to uphold the judgment in the latter, are as follows: That the definition given by a majority of the judges, in the first case, of the term "bills of credit," is too general, as it would embrace every description of paper that circulates as money: That a bill of credit is what it truly purports to be, resting merely on the credit of the drawer, in contradistinction from a paper medium with a fund for its redemption: That the usual quality of such a bill, within the meaning of the constitution, is that it must be issued by a state directly, and its circulation enforced by law: That the definition which includes all classes of paper emissions by the colonies or the continental congress, is a paper issued by a sovereign power, containing a pledge of its faith, and designed to circulate as money: That if a state is prohibited by the constitution from doing by indirection that which she can not do directly (and as this is an incontrovertible principle), then it necessarily follows, according to the doctrine laid down in *Craig et al. v. The State of Missouri*, that a state has no right to borrow money to pay for services actually performed, or to incorporate private banking companies; for all these instruments, being bills of credit, are included in the prohibition: That such a construction would rob her of sovereignty, by cutting off at once her revenues and the means of improvement and security, and would place her powers absolutely under the control of the general government, by the mere declaration and interdiction of paper issues; for the object of the convention was to prevent the issue of paper money by state governments, without any fund to redeem it; and to constitute such emissions, the state must authorize the issues on her own credit and in her own name: the agents who act in the management of the corporation must be capable of binding her in her sovereign character: That, as private banks existed at and before the adoption of the constitution, they were not included in the prohibition: That to make the constitutionality or unconstitutionality of an act depend upon the amount of the interest that the state has in the incorporation, is to fix a fluctuating and ever-varying rule in the construction

of that instrument: That the state has the right to incorporate private banks; and this principle being conceded, then may she make herself a stockholder in the incorporation. If it be allowed her to become part owner in the corporation, why may she not be the entire stockholder? at what point is her interest to stop? When she mixes her own credit and capital with that of private individuals, she divests herself of all her sovereign attributes, and partakes of the character of other corporators, and has no more control over the affairs of the corporation than others, or only to the extent fixed by the charter.

These positions and principles led the court to sustain the constitutionality of the act establishing the Commonwealth bank of Kentucky. The statute created the president and directors a corporation, made them elective by the legislature, and gave them full power and authority to issue bank notes, and to do and perform the usual acts belonging to such corporation. It provided a fund for the redemption of the notes, and made their issues receivable for taxes. The funds of the bank were responsible for its liabilities; and although the state was the entire owner of the bank, and had unlimited control, through the agency of her legislature, of its affairs and its operation, still these things, in the opinion of the court, did not make the bank issues bills of credit, within the meaning of the constitution. No two causes probably ever attracted more of public interest or attention, than the two celebrated cases we have been considering; and none ever were decided, in any tribunal, upon more mature deliberation and reflection. For sure, none ever involved higher principles of constitutional law acting upon the sovereignty and independence of the states.

The pleadings in the case now before the court, unquestionably show, that if the Commonwealth bank of Kentucky be constitutional, the act establishing the Bank of the State of Arkansas must be valid. The two banks possess precisely the same essential qualities, and stand upon the same principle. The state, in both cases, is the entire stockholder, and has unlimited control over its affairs, through their legislatures. Indeed, if there is any difference in the two cases, it is in favor of our own bank. The bank of the state is made, as well by the constitution as by her charter, the depository of the funds of the state; her capital is raised upon the faith of the state; and her notes made receivable for taxes. She is authorized to deal in bullion, gold, and silver, and issue notes, bills, or drafts, of a certain denomination. The gross amount of her issues are

not to exceed triple the amount of her capital. This enumeration of her powers and privileges brings the question, so far as the constitutionality of the act of incorporation is concerned, expressly within the principles of the decision of the supreme court of the United States.

We have stated the reasons and principles of these two celebrated cases at some length, so that the public and the profession of our state may be in possession of them. It now remains to be seen how far this court is bound by the authority of the decision of *Briscoe v. The Commonwealth Bank of Kentucky*. Whatever opinion may be entertained abstractedly of its truth or justice, one thing is clear, that the rule on the subject is finally and conclusively settled by the highest court in the union; and there is not the least probability that it will be shaken or overturned in our time. We have repeatedly held, and that, too, on several important occasions, that the judiciary is the final interpreter of the will of the constitution, within its appropriate jurisdiction. This principle lies at the very foundation of our happy systems of government, and constitutes the only means by which their freedom and independence can be preserved for ourselves, and perpetuated for our posterity. A contrary doctrine, in our opinion, tends to anarchy and revolution; and it has been mainly owing to the want of an independent constitutional judiciary in other countries, that mankind have so often been induced to right themselves by force, instead of appealing to the peaceful protection of the laws against the abuses of arbitrary power. All the departments of the government are unquestionably entitled and compelled to judge of the constitution for themselves; but, in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. The judiciary speaks last upon the subject; and when it has once spoken, if the acts of the other two departments be unauthorized or despotic, in violation of the constitution or the vested rights of the citizen, they cease to be operative or binding. The entire systems of our federal and state judiciary are intended to act in perfect harmony with each other; and thus these respective governments and the people have a double security for their rights and liberties. The supreme court of the United States constitutes the national forum of the last resort, upon all questions involving the construction of the constitution of the general government, the acts of congress, and foreign treaties made in pursuance of its authority. Their decisions and opinions in these cases are final, and must

be imperative upon all the state courts. This must be so in the nature and necessity of things, or there would be no sovereign power, under our forms of government, to prescribe a rule of action possessing uniformity, consistency, and supremacy, which is indispensably necessary to the security of life, liberty, and property, and the pursuit of happiness. We hold ourselves as much bound by the decisions of the supreme court of the United States, on these questions, as we do our own state courts bound by our judgments.

Entertaining these views, and being deeply impressed with their truth and importance, it is with the utmost cheerfulness, and in good faith, that we conform our opinion, in the case now before us, to the rule laid down and established in the case of *Briscoe v. The Commonwealth Bank of Kentucky*; and we therefore declare the law incorporating the bank of the state of Arkansas to be constitutional.

Having disposed of this question, we will turn our attention to the other points relied on by the plaintiffs in error to reverse the judgment below. There is no error in the court below in treating the plea of *non est factum* as a nullity. The plea was not sworn to, as the statute in such cases requires, and therefore ought to have been stricken from the rolls.

The defendants' plea of usury is fatally defective. It does not allege that there was a corrupt agreement to take more interest than the law allows. The corrupt agreement is of the essence of a usurious contract, which is nothing more than taking more interest than allowed by law. It must be averred and proved, to support the defense, as the authorities in the brief decidedly show.

The objection, that the bank has no power to take writings obligatory in payment of her debts, we do not think tenable, in the aspect that the case now presents. Under a certain state of facts, it may and probably does possess such authority. We are unable to say upon what consideration the writing obligatory in the record was given. The presumption is, that the bank acted in conformity with the charter; and if that was not the case, it was the duty of the party below to make that fact appear. His failing to do so, leaves the presumption to stand against him, and of course there is no error upon this point.

The error, if any, in giving judgment for ten per cent. interest from the date of protest, has been corrected by the remittitur entered of record in this court.

Judgment affirmed.

An opposite decision to this case will be found in *Bank of Kentucky v. Clark*, 28 Am. Dec. 345. That case was, however, decided upon the authority of *Craig v. Missouri*, 4 Pet. 432, the case of *Briscoe v. Bank of Kentucky*, 11 Id. 257, not yet having been decided. See also *Linn v. State Bank of Illinois*, 25 Am. Dec. 71, in the note to which this subject is discussed.

LANE v. LEVILLIAN.

[4 ARKANSAS, 76.]

A GENERAL DEMURRER TO A DECLARATION WHICH CONTAINS SEVERAL COUNTS is bad at common law, if any one of the counts is good.

THE LAW OF THE FORUM WHERE A CONTRACT IS MADE governs its obligation.

THE CONTRACT OF A GUARANTOR IS CONDITIONAL where it is continuing, or where it relates to a future transaction; and in such cases, to determine the liability of the guarantor, demand must be made upon the principal debtor, and notice given to the guarantor of the failure of the latter to pay.

AN UNDERTAKING OF A GUARANTOR IS PRIMARY, and he is entitled neither to demand nor notice, if his contract relate to a debt already due.

ASSUMPSIT. The first count of the declaration, upon which the principal discussion arose, is set forth in the opinion of the court. Two other counts were also included in the declaration; one, a common money count; the other, founded upon an acceptance by plaintiff for the accommodation of defendant of a bill of exchange, which plaintiff had been subsequently obliged to take up. A general demurrer to the declaration was sustained. The present defendant was the administrator of the original defendant.

Pike, for the appellants.

Trapnall and Cocke, contra.

By Court, LACY, J. There can, we think, be no question but that the demurrer in this case was improperly sustained. It was a general demurrer to the whole declaration, which contained three counts: two of them are unquestionably good, and the demurrer as to them should have been overruled. The action was commenced and determined under our territorial statutes; and, of course, the common law rule upon the subject stood then in full force. And the doctrine upon the point is well settled, that where there are good and bad counts in the same declaration, and there is a general demurrer filed, judgment shall be taken upon the good counts, without regard to the bad: *Duppa v. Nayo*, 1 Saund. 226;¹ *Bressey v. Humphries*,² Cro. Jac. 557; Com. Dig., Pleader, 2, 3.

1. *Duppa v. Mayo*, 1 Saund. 275.
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2. *Bressey v. Humphreys*.

The most important question in this cause arises upon the first count, which charges the defendant below upon a guaranty, in which no demand or notice is alleged to have been given. On the twenty-seventh of January, 1829, Thomas B. Franklin executed his note to B. Lane & Co. for eight hundred and nine dollars and sixty-one cents, payable upon the first of May following. And the declaration alleges that the defendant, upon the seventeenth of June, 1829, by his indorsement upon the back of the note, in consideration of one dollar, guaranteed the payment of said note. The guaranty was entered into in the city of New Orleans. It is well settled that the law of the forum, where the contract was made, must govern its obligations. Upon this state of facts, the point to be decided is, could the plaintiff charge the defendant, without averring demand upon the original debtor, or showing some legal excuse for failing to make such demand, and notifying the guarantor of the non-payment of the debt? or, in other words, is this a conditional or absolute guaranty?

In the authorities on the subject of guaranties, there is a good deal of seeming, and some irreconcilable, contradiction in the cases. The difficulty does not seem to lie so much in the principles as stated, as in their application to the facts in controversy. By the general principles of law, the guarantor is only collaterally liable, upon the failure of the principal debtor to pay the obligation. A demand upon him, and a failure upon his part to perform his engagements, are indispensable in such cases to constitute a cause of action; and the authorities upon this point are full, and can admit of no question. In such cases, the guaranty is held to be a collateral or conditional contract, arising out of the original obligation: *Douglass et al. v. Reynolds et al.*, 7 Pet. 113; *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68]; *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 334]; *Phillips v. Astling*, 2 Taunt. 206.

The engagement of a guarantor is generally founded on some new or independent consideration, growing out of the original obligation, except in those cases where it is given at the time of the contracting of the principal debt, and is necessarily connected with it: *Seward v. Vrederburg*,¹ 8 Johns. 29; *Dewolver v. Debaud*,² 1 Pet. 476; 3 Kent's Com. 86.

Where a party gives a continuing guaranty, or where it relates to future transactions, the general rule upon the subject is that the guarantor has a right to know whether his guaranty has

¹. *Leonard v. Vrederburg*; 8 S. O., 5 Am. Dec. 317.

². *D'Wolf v. Rabaud*.

been accepted, or to what extent he may be liable; and in such cases, demand and notice are necessary to charge him. The reason is, that his agreement is collateral or conditional, and so both parties understand it to be; and his liability does not accrue, unless he who receives the benefit from it fixes it by demand and notice. The guarantor is liable upon the expressed or implied condition, that due and proper diligence would be used to promote payment from the original obligor. *Warrington v. Furlur*, 8 East, 340;¹ *Phillips v. Astling*, 2 Taunt. 206; *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 334]; *Bank of New York v. Livingston*, 2 Johns. 409;² and *Cumpston v. McNair*, 1 Wend. 457, all establish this principle, and turned upon guaranties on bills of exchange or promissory notes not then payable, but which would be duly honored and paid thereafter. In these cases, demand and notice were held necessary, upon the principle that certain legal steps were to be taken and pursued by the creditor (cases of insolvency excepted) to give effect to his guaranty. The rule, however, is changed, when the debt, which is the subject of the guaranty, has become due and absolute before the guaranty is given. The creditor is not required then to take any legal steps to perfect his claim on the principal debtor. It was made perfect before the guaranty given, and the law holds the guarantor cognizant of that fact. His undertaking is not treated or considered as a secondary or collateral liability, but as a primary and positive agreement, by which he binds himself to see that the principal debt is paid. This dispenses with the necessity of demand and notice. It is upon this principle, that when a guaranty is entered into, that the original debt shall be paid upon a particular day, it is the duty of the guarantor to see that it is paid upon that day; and, in such cases, he is chargeable without demand and notice. And so it was held in *Breed v. Hillhouse*, 7 Col. 523,³ where the guaranty was held for the payment of the note within four years from its date; and in *Lee v. Dick*, 10 Pet. 496, the supreme court of the United States says: "There are many cases where the guaranty is of a specific existing demand, by a promissory note or other evidence of debt; and in such cases, the guaranty is given upon the note itself, or with reference to it, or recognition of it, where no notice would be necessary. The guarantor, in such cases, knows positively what he guarantees, and the extent of his responsibility; and any further notice to him would be useless." The whole doctrine upon this subject will be found reviewed in *Reed v. Cutts*,

1. *Warrington v. Furlur*, 8 East, 242.

2. 2 Johns. Cas. 409.

3. 7 Conn. 523.

2 Greenl. 189,¹ in which most of the leading cases are collated and commented upon; and the rule there established is in accordance with the one we have before stated. Indeed, all the later cases seem to tend to dispense with demand and notice, unless the guarantor's liability is shown, either by his express contract or by its necessary implication, to be a collateral agreement: provided, the creditor's delay be unaccompanied by fraud, or an agreement not to prosecute the principal debtor without the assent of the security. This is the doctrine of the common law upon the subject; and the civil law certainly does not hold a party, we think, to greater strictness as to demand or notice.

According to the Louisiana code, suretyship is an accessory promise, by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not: *Hayne v. Manfield*,² 9 Mar. 385; *Aston v. Morgan*, 2 Id. 353 [5 Am. Dec. 733].

The obligation of a security towards a creditor is, to pay in case the debtor does not satisfy the debt, and the property of such debtor is to be previously discussed and seised, unless the security should have renounced the plea of discussion, or should be bound *in solido*: La. Code, art. 3014. That the creditor is not bound to discuss the principal debtor's property, unless he should be required to do so by the surety on the institution of proceedings against the latter: Id. 3015.

From these provisions of the civil code of Louisiana, and the principles applicable to them, as settled by the supreme court of that state, we entertain little or no doubt that, upon a guaranty after the note has become due, and the right of action being perfect against the original debtor, the surety's obligation is an absolute agreement to pay the debt, in case the original debtor does not; and, in such case, he will be held liable, without demand or notice. The principle here stated, we think, is clearly distinguishable from the rule laid down in the case of *Ringgold v. Newkirk and Oldem*, decided at the July term of this court, 1840: 3 Ark. 107. That case must be construed, like all others, in reference to the particular facts before the court; and any general or unqualified expressions found in the opinion must be restricted and limited to the sense in which they were intended to be used by the court, in relation to the subject-matter before it. The court, in that case, considered the guaranty given, as looking to a future transaction, in securing the payment of a bill of goods delivered, but which was to be paid

1. *Read v. Cutts*, 7 Greenl. 189; S. C., 22 Am. Dec. 184.

2. *Herries v. Canfield*.

at some future period; and, therefore, they held demand and notice necessary to charge the guarantors. Whether or not the two cases are reconcilable with each other, is a matter of but little moment, in comparison with our desire to find out and establish the true rule upon the subject. We feel ourselves constrained, by the weight of authority, to affirm the principle before laid down, that where a party guarantees a note already due, and the creditor has committed no act either of fraud or culpable negligence, whereby he discharges the guarantor, that, in such a case, both common and civil law hold demand and notice to be unnecessary. This rule unquestionably proves that the court below erred in sustaining the demurrer to the first court.

Judgment reversed.

UNDERTAKING OF A GUARANTOR: The same distinction as that taken in the principal case between the instances where a guarantor is entitled to demand and notice, and where not, is made in *Read v. Cutts*, 22 Am. Dec. 184.

OBAUGH v. FINN.

[4 ARKANSAS, 110.]

WRITTEN WORDS MAY BE LIBELOUS AND ACTIONABLE, though they would not have been slanderous had they been spoken.

WORDS WRITTEN AND PUBLISHED ARE LIBELOUS whenever they tend to cast contumely upon a party, or to prejudice him in his employment; and proof of the publication of such words will alone sustain an action, without the necessity of the proof of special damages.

UPON A DEMURRER TO EVIDENCE, FINAL JUDGMENT must be entered for the plaintiff or defendant, accordingly as the demurrer is overruled or sustained.

UPON A DEMURRER TO THE EVIDENCE BEING INTERPOSED, the jury should be discharged either at once or after a conditional verdict has been taken for plaintiff. It will be error to retain the jury, and to submit to them, after the demurrer has been overruled, the assessment of damages.

CASE for libel. The libel complained of consisted in the publication in the Arkansas State Gazette of the following notice:

“Caution.—The public are hereby cautioned against one John Finn, a plasterer by trade, who absconded from this city on the eleventh instant, without paying any of his numerous debts, and swindling me out of fifty-five dollars, which I had advanced him on his promise to do a certain piece of work. Said Finn was formerly from Baltimore; and is said to have left that place in a similar manner. It is not for the small amount of money

out of which he has swindled me, that I now publicly advertise him, but to put others on their guard against his villainy.

“JAMES H. OBAUGH.”

The declaration alleged the publication to have been false and malicious, etc., but showed no special damage. The general issue was pleaded, and also a special plea, averring the truth of the matters contained in the publication. Plaintiff on the trial proved that he was by trade a plasterer, and that the above notice was published at the instance of defendant. Defendant thereupon interposed a demurrer to the evidence, and upon a joinder therein by plaintiff, moved for the discharge of the jury. This was refused; and the demurrer having been overruled, the court, against the objection of defendant, submitted the question of the assessment of damages to the jury. There were exceptions to other proceedings of the court that need not be mentioned. The jury rendered a verdict in favor of plaintiff for two hundred dollars. Defendant sued out a writ of error.

Trapnall and Cocks, and Ashley and Watkins, for the plaintiff.

Hempstead and Johnson, and Pike, contra.

By Court, RINGO, C. J. Several questions are presented by the record and assignment of errors; one of which is, that the court erred in overruling the demurrer to evidence. The argument in support of this objection rests upon the assumption, that the publication charged in the declaration is not in itself libelous, and will not support an action at law, unless special damages be alleged and proved. And a great number of adjudged cases have been cited to show that the language contained in the publication, if uttered verbally, would not, in law, be deemed slanderous, or support an action; and we are urged to disregard the well-known distinctions between libels and slander, and to hold, that no action can be maintained for the publication of language which, if only verbally spoken, would not support an action. We have carefully examined the cases cited, and, upon deliberate consideration, come to the conclusion, that the law, in this respect, is too well established to be now questioned or departed from. The distinction has been uniformly maintained for ages, in the courts of England, and has been recognized in most, if not all, of the United States. And language, though not actionable, if merely spoken, has, in many cases, been adjudged libelous when written and published. And the rule appears to be well established, that any words, written and pub-

lished, throwing contumely on the party, or prejudicing him in his employment, are actionable.

That the language used in the publication, upon which this action is founded, is such as to bring the individual, of whom it was published, into contempt, ridicule, and disgrace, and injure him in his employment or trade, there can, in our opinion, be no doubt. It is, therefore, within the rule above stated, and is actionable, without any allegation of special damages arising therefrom. The testimony proved the publication, by the order of Obaugh, as stated in the declaration, and that Finn was a plasterer by trade, doing business as such in the city of Little Rock and county of Pulaski. The demurrer admitted the truth of these facts, and they were unquestionably sufficient in law to maintain the action. And, therefore, there was no error in the judgment of the court overruling said demurrer.

But it is insisted, that the court erred in refusing to discharge the jury, on the motion of the plaintiff in error, upon his demurrer to the evidence being filed and received by the court, and in retaining it until the demurrer was adjudicated and disposed of by the court, and then suffering them to pass upon or try the issue joined, notwithstanding his interposition of the demurrer to the evidence. The authorities cited in the briefs clearly show, that the object and effect of a demurrer to evidence are, to take from the jury, and refer to the court, the application of the law to the testimony; and, where the testimony is, upon such demurrer, adjudged insufficient in law to maintain the action, it is equally certain that a final judgment must be pronounced thereupon in favor of the defendant; and the like judgment must be given for the plaintiff, if the demurrer be overruled, in all cases where the subject-matter of the controversy is such as not to require the intervention of a jury, for the purpose of ascertaining or assessing unliquidated damages. These rules appear to be well settled, and are not questioned by either party in this case.

It is also admitted, that the usual course of proceeding upon a demurrer to the evidence being filed, is either to take a verdict for the plaintiff, conditionally, and then discharge the jury; or to discharge the jury before any verdict is rendered, and then dispose of the demurrer; and if, in the latter case, the demurrer should be decided in favor of the plaintiff, and the damages to which he is entitled be unliquidated, a writ of inquiry is awarded, and another jury impaneled thereupon, to inquire of and assess them. And the latter course of proceeding, upon a reference to the books and cases cited in the briefs, appears to be the

most usual; but it is said that either would be regular; and cases are cited, by the defendant in error, to prove that, in some of the American states, a course of proceeding, different from either, has been indulged, and such departure therefrom held to be no error. Besides, he insists that it is a mere matter of practice, which may be modified or changed by the circuit court at will, and so be regulated according to its sense of propriety or convenience. This argument is plausible; and we have experienced some difficulty in coming to a satisfactory conclusion upon the question. Our deliberations, however, have resulted in the opinion, that, notwithstanding it is in some respects a matter of practice, yet, it is a practice so interwoven with the law, that it can neither be disregarded nor changed at the discretion of the court. Nor do we consider it any more a matter of mere practice than the filing of the demurrer itself; which the court, under some circumstances, in the exercise of a sound legal discretion, may certainly refuse to receive; yet, when the testimony is in every respect certain, or in writing, the defendant would, as we apprehend, have a legal right to demur, if he desired to withdraw it from the consideration of the jury. And, in such case, the court, in the exercise of any discretion with which it is vested, would not be justified in refusing to receive it, or compel the plaintiff to join therein.

It may be regarded as in many respects similar to the right of filing or amending the pleadings in a cause, the admission or rejection of which anciently depended upon the practice of the courts, and was regulated by nothing but their discretion. But many of the rules of practice, so established, have long since become incorporated with the common law, so as to constitute a part thereof—thus forming not merely rules of practice, but constituting principles of law, binding upon the courts as well as the parties, and establishing legal remedies, prescribing their form and order, as well as the manner of conducting them. Take the order of pleading as an illustration; and inquire by what authority the courts, wherever the common law has been adopted, refuse to receive or regard pleas to the jurisdiction of the court, or in abatement of the suit, after a plea in bar of the action has been filed. The answer, we apprehend, must be, that the law forbids such defense, after a defense has been interposed in bar of the action; yet the order of pleading was originally nothing but the practice adopted by the courts themselves, for convenience and the better administration of justice, which, in the course of time, became parcel of the common law. And, therefore, a party failing to observe the order so established, often

loses the advantage of a defense, of which he could have availed himself if he had interposed it at a proper time and in legal form; and so it has been uniformly ruled by this court. And cases may be found where judgments have been set aside because the established order of pleading had not been observed; the judgment having been given upon some defense, which, according to that order, had been waived, or superseded by the interposition of some defense posterior to it in the legal order of pleading. Yet, this could not be, if the order of pleading depended upon the simple discretion or mere practice of the court, as contradistinguished from the rules of practice and order of proceeding prescribed by law. Such, also, is the character of the rule which prescribes the order of proceeding upon the filing of a demurrer to evidence; it is a rule of practice established by law, which the court and parties are bound to observe. In the present case, the rules of proceeding established in such case, have been entirely departed from, and a course of proceeding, wholly unauthorized by any rule or precedent, has been adopted, with the sanction of the circuit court, without the assent of the plaintiff in error, and in derogation of his legal rights; and, therefore, there is error in the proceeding and judgment against him, of which he may well complain, although it is impossible to know what would have been the result, if the proceeding had been conducted according to law. He had a legal right to require that it should be so conducted; or in other words, he was entitled to a legal trial which was refused him by the court.

And, therefore, it is unnecessary to determine such other questions as are presented by the record and assignment of errors, as they will probably never arise upon another trial of the case.

Judgment reversed.

WORDS WRITTEN AND PUBLISHED MAY BE LIBELOUS though they would not be actionable had they been spoken. It will be sufficient to render a publication libelous that it renders a person ridiculous, or exposes him to contempt, or impairs his standing in society as a man of rectitude or principle: *Fonville v. McNease*, 31 Am. Dec. 556 and note, in which other cases are cited.

McLAIN v. CARSON'S EXECUTOR.

[4 ARKANSAS, 164.]

AT COMMON LAW A PARTNERSHIP DEBT IS THE JOINT DEBT of the partners, and the death of any member of the firm extinguishes the debt as to him; and the remedy of the creditor is confined to one against the survivors.

IN EQUITY A PARTNERSHIP DEBT IS CONSIDERED JOINT AND SEVERAL, and upon the death of any member of the firm the creditor may proceed directly against the estate of the deceased partner. This rule has been adopted by our statute, and in consequence in Arkansas a partnership creditor is entitled to an allowance in the probate court of a partnership debt which he has presented to the representative of a deceased partner.

APPEAL from the probate court of Lafayette county. That court had allowed a claim presented against the estate of Samuel P. Carson, by plaintiffs, partnership creditors of the firm of Percifull & Co., whereof said Carson had in his life-time been a member. The executor appealed from this order of the probate court to the circuit court, where it was reversed. Plaintiffs thereupon appealed to this court.

Trapnall and Cocke, for the appellants.

By Court, LACY, J. The doctrine of partnership, in these cases, is well settled in England. At law, the contract was always treated as a joint agreement; and upon the death of one partner, a joint creditor could not proceed against his separate estate. The reason is, that, by the death of the joint partner, the joint contract, as to him, becomes extinguished. The creditor may have his action against the survivor or joint contractor: 1 Ch. Pl. 57; Collier on Part. 337. In equity, there is some conflict between the authorities. The creditor, in equity, will be permitted to receive satisfaction of his debt out of the estate of the deceased partner, under certain restrictions, through the medium of subsisting equities between the parties themselves; and Lord Eldon has pithily remarked, "that separate creditors must take the separate estate, and the joint creditors the surplus:" *Greer v. Chiswell*,¹ 9 Ves. 118; *Jacomb v. Harwood*, 2 Id. 265. And Lord Brougham said, in *Sumner v. Powell*, 1 Meriv. 73,² "that a partnership debt has been treated, in equity, as the several debt of each, though, in law, it is only the joint debt of all."

The general rule upon the subject is, that if, upon the decease of a partner, the creditor's contract is to be treated as several, as well as joint, in respect to the firm, then he will of course be entitled to receive satisfaction in equity, immediately out of the estate of the deceased partner, and to take his portion *pari passu* with separate creditors. Under our laws, no such thing as a joint contract, in the sense in which it is used in England, can be allowed. Our statute regulating proceedings upon such subjects, enacts, "that all joint debts or obligations shall survive

1. *Gray v. O'Connell*.

2. 2 Meriv. 37.

against the heirs, executors, and administrators of such joint debtor or obligor, as may die before the discharge of such joint debt or obligation:" Rev. St., secs. 1 to 24, p. 475. This act makes a partnership debt a several, as well as a joint contract; and the partnership creditor is, consequently, invested with a legal right to proceed immediately against the estate of the deceased partner, and to be paid at the same time with separate creditors. The debt against the firm being separate as well as joint, the death of the one partner can not extinguish the separate demand against his estate. That contingency leaves his right in full operation, and the deceased partner's estate bound separately for the debt.

Judgment reversed.

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2. ACCORD AND SATISFACTION procured by the debtor's willfully misrepresenting or suppressing any material fact in the statement of his affairs, are void; and even a sealed release based thereon will be set aside in equity. *Stafford v. Bacon*, 366.
3. MORAL OBLIGATION TO PAY THE RESIDUE OF A DEBT DISCHARGED BY ACCORD AND SATISFACTION does not exist, and, therefore, a promise to pay such residue can not be enforced by action; such obligation exists when a debt is discharged by the provision of some positive law, and not by the act of the parties. *Id.*

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2. **AUTHORITY CONFIDED TO JUDGMENT AND DISCRETION OF AGENT**, whether private or public, imports personal trust and confidence, and can not be subdelegated by such agent. *Lyon v. Jerome*, 271.
3. **CANAL COMMISSIONERS CAN NOT DELEGATE** to an engineer or other subordinate the authority conferred upon them by statute to enter upon lands of citizens and take and use their property "as they may think proper" in constructing the canal, that authority being discretionary in its nature; and an engineer entering upon land and taking materials for the construction of the canal without the express direction of the commissioners is liable in trespass. *Id.*
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2. AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS INVALID if it give the trustees power, from time to time, to vary and depart from the order of settlement, and to pay in full or in part, by compromise or otherwise the debts of the assignor, because it permits him to set his creditors at defiance, and compels them to bid against one another for the favor of being paid their debts or a part thereof. *Id.*
3. PROPERTY OF DEBTOR WHICH VESTS IN HIS ASSIGNEE UNDER STAT. 1838, c. 163, is that only which he had at the time of the first publication of the notice of issuing the warrant to the messenger. And therefore, where a mortgage was made by the debtor, which was recorded before that time, but after the assignment was made, it will be good as against the other creditors, and the mortgagee will hold the property mortgaged. as against the assignee. *Briggs v. Parkman*, 89.

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1. ATTORNEY MAY BE GARNISHED FOR MONEY IN HIS HANDS collected for the execution debtor. *Mann v. Buford*, 691.
2. GARNISHEE'S ANSWER SUFFICIENTLY ADMITS INDEBTEDNESS to the execution debtor to authorize judgment against such garnishee, even though it contains no express admission, if it states facts showing such indebtedness to exist. *Id.*
3. WRIT OF ERROR JOINING GARNISHEE AND EXECUTION DEBTOR brought to reverse a judgment discharging the garnishee is irregular, but if no objection be made to such misjoinder, the defect is waived. *Id.*
4. IF ANSWER OF GARNISHEE SHOWS THAT A THIRD PERSON CLAIMS the debt or some interest therein, such third person should be cited to appear. *Payne v. Mayor of Mobile*, 744.
5. TRUSTEE PROCESS LIES ONLY FOR DEBTS RECOVERABLE BY THE DEFENDANT against the trustee at law. A debt contingent upon the satisfaction of a mortgage not satisfied can not be attached. *Hoyt v. Swift*, 586.
6. THE ANSWER AND ADMISSION OF ONE PARTNER UPON PROCESS OF GARNISHMENT, where both have been regularly served with process, will bind the other. *Anderson v. Wanzer*, 170.
7. TO PROVE THAT ATTACHMENT WAS MADE ON WRIT WHICH IS LOST, a person who saw the officer sign his return thereon is a competent witness, and it is not necessary that the officer himself should be called, although he is within the process of the court. *Nelson v. Boynton*, 148.
8. A RECEIPTOR OF ATTACHED PROPERTY MAY BRING TROVER against one who takes it out of his possession having no color of right. *Thayer v. Hutchinson*, 607.
9. RELIEF FROM A FORTHCOMING BOND CAN NOT BE OBTAINED on the ground that the levy therein recited is fictitious. *Mead v. Figh*, 742.

See ASSIGNMENT OF CONTRACTS, 1, 4; TRESPASS, 3.

ATTORNEY AND CLIENT.

1. EMPLOYMENT OF AN ATTORNEY IS PROVED SUFFICIENTLY by his acting as such for the plaintiff and being recognized as acting in that capacity on the records of the court. *Smallwood v. Norton*, 39.
2. ATTORNEY SHOULD DEFEND AGAINST REPLEVIN PROCESS to recover goods seized on an attachment sued out by the attorney on a judgment obtained by him. *Id.*
3. PLAINTIFF IN REPLEVIN BECOMING NONSUIT, the attorney for the attachment creditor should move for a judgment for a return of the property levied, and for a failure to do so, in consequence of which the claim is lost, the attorney is liable for negligence. *Id.*
4. IN ACTION AGAINST ATTORNEY FOR NEGLIGENCE in failing to move for a judgment for a return of the property when the plaintiff in replevin has been nonsuited, the attorney can not show that the plaintiff in replevin was the real owner of the property. *Id.*
5. ATTORNEY AT LAW IS LIABLE FOR HIS NEGLECT TO BRING SUIT upon a note deposited with him for collection, notwithstanding he may have honestly believed, in the exercise of his best judgment, that a suit would prove unavailing. *Cox v. Livingston*, 486.

6. NOTE PLACED IN THE HANDS OF AN ATTORNEY AT LAW is presumed to be for the purpose of commencing an action thereupon for its collection, whether from his knowledge of the debtor's circumstances he may deem such action advisable and expedient or not. *Id.*
7. MEASURE OF DAMAGES IN AN ACTION AGAINST AN ATTORNEY AT LAW for neglect to sue upon a note given him for collection, is the sum that might have been recovered of the maker if a suit had been commenced and prosecuted to judgment. *Id.*
8. ATTORNEY WITNESSING A DEED, OR THE SIGNING OF AN ANSWER, or any other fact, may be required to testify concerning the same. *Coveney v. Tannahill*, 287.
9. ATTORNEY BEING ASKED WHETHER HE WAS PRESENT WHEN AN ACCOUNT STATED WAS SIGNED, and when and where it was signed, and who were present, can not properly refuse to answer on the ground that the matter is in the nature of a privileged communication. *Id.*
10. SUBPENA DUCES TECUM UPON AN ATTORNEY TO PRODUCE PAPERS of his client, need not be obeyed. *Id.*
11. ACTS AND TRANSACTIONS OF A CLIENT, DONE IN THE PRESENCE OF AN ATTORNEY, may be testified to by the latter. *Id.*
12. PRIVILEGED RELATION OF ATTORNEY AND CLIENT exists for lawful purposes only, and the former may be required to disclose a criminal design confided to him by the latter. *Id.*
13. WHETHER COMMUNICATION IS PRIVILEGED is for the court to decide. *Id.*
14. ATTORNEY CALLED BY HIS CLIENT TO WITNESS A BUSINESS TRANSACTION between the latter and a third person, is not privileged from testifying to what he there saw. *Id.*
15. ATTORNEY CAN NOT BE REQUIRED TO TESTIFY WHAT WAS THE STATE of a written instrument when first exhibited to him by his client, or whether, when he first saw an account in the hands of his client, the evidence of settlement was indorsed on it. *Id.*
16. CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT, whether oral or written, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege. *Id.*
17. ATTORNEY CAN NOT BE REQUIRED TO PRODUCE A PAPER NOR TO DISCLOSE ITS CONTENTS, when it was deposited with him by his client. He may be required to testify concerning its existence, and whether it is in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents. *Id.*

See PAYMENT, 2.

AUCTIONS.

1. WHERE UPON A SALE AT AUCTION OF NUMEROUS ARTICLES of personal property the purchaser is given the option of choosing from a quantity, a specific amount, the privilege being sold as successive "choices," it becomes incumbent upon the purchaser to make his choice forthwith. He can not take advantage of his own neglect to do so to avoid his liability upon the purchase. *Coffman v. Hampton*, 511.
2. THOUGH IN AN ACTION AGAINST A VENDEE to recover the sum due upon a sale, the usual mode of ascertaining the measure of damages where

there has been a resale, is the difference between the price first offered and that for which the goods were eventually sold, yet the jury are not bound by this mode of estimation if they can discover any other more agreeable to the truth. *Id.*

3. SALE AT AUCTION OF NUMEROUS ARTICLES OF PERSONAL PROPERTY constitutes but one entire contract though the articles are separately struck off at different prices. *Id.*
4. MISTAKE BY AUCTIONEER IN ENTERING THE VENDOR'S NAME, will be corrected in equity. *Pugh v. Chesseldine*, 414.

AUTREFOIS CONVICT.

See CRIMINAL LAW, 6.

BAILMENTS.

1. A BAILEN MAY DENY HIS BAILOR'S TITLE by showing that the latter obtained possession of the goods either fraudulently, tortiously, or feloniously. *King v. Richards*, 420.
2. LIABILITY OF BAILEN.—One who at the owner's request takes a drive in a sulky, is liable for injury to it occasioned by his want of common prudence. *Carpenter v. Branch*, 587.

See LIEN, 2.

BANKRUPTCY AND INSOLVENCY.

1. PROMISE TO PAY A DEBT DISCHARGED BY BANKRUPTCY and the like, must be specially pleaded. *Stafford v. Bacon*, 366.
2. COMMUNICATION TO A STRANGER OF AN INTENT TO PAY A DEBT which has been discharged, is not available to the creditor as a promise to pay him such debt. *Id.*

BANKS AND BANKING.

CASHER OF A BANK HAS NO AUTHORITY TO INDORSE NEGOTIABLE PAPER held by it, for the purpose of transferring the interest of the bank therein, or for any other purpose than to facilitate the collection of the note. *Elliot v. Abbot*, 227.

See PAYMENT, 2; USAGE, 1, 2.

BARRATRY.

See INSURANCE, 4.

BILLS OF CREDIT.

See CONSTITUTIONAL LAW, 10.

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS, 6-8, 18; PARTNERSHIP, 1; STATUTE OF FRAUDS, 7.

BONA FIDE PURCHASERS.

See MORTGAGES, 4, 5; NEGOTIABLE INSTRUMENTS, 10.

BONDS.

1. **IN JOINT AND SEVERAL BOND, ALL OBLIGORS ARE PRINCIPAL DEBTORS**, as between the obligors and obligees, though as between each other they may have the rights and remedies resulting from the relation of principal and surety. *Newcomer v. Kline*, 74.
2. **STATUTE PROVISION REQUIRING A COURT TO PASS UPON ALL OFFICIAL BONDS**, that have been received by the clerk during vacation, at the next term, and approve of or reject the same, is for the benefit of the public, and therefore a failure upon the part of the court to comply therewith, is no defense to an action upon the bond. *Jones v. State*, 180.
3. **RECEPTION AND DETENTION OF AN OFFICIAL BOND**, without objection, for a considerable length of time, by an officer who is required by law to pass upon it, is sufficient evidence of his acceptance. *Id.*
4. **WHERE A STATUTE DIRECTS BONDS FOR THE PUBLIC BENEFIT** to be made payable to the governor or other functionary having legal succession, the office is the payee, and the successor, whether described *eo nomine* either in the statute or bond, or not, may sue on the bond. *Polk v. Plummer*, 566.
5. **IN STATUTORY BONDS, SUPERADDED CONDITIONS** not imposed by the statute may be rejected as illegal, and the conditions required by the statute enforced. *Id.*
6. **BOND EXECUTED BY PUBLIC OFFICER**, not good as a statutory bond, may be good as a voluntary obligation upon which an action can be maintained. *Goodrum v. Carroll*, 564.
7. **DEED DELIVERED TO STRANGER FOR THE USE OF THE OBLIGEE** into whose hands it subsequently comes is good from the time of the delivery to the stranger. *Id.*
8. **BOND ACCEPTED BY THE OBLIGEE AT THE TIME OF THE PLEA** is the bond of the obligor. *Id.*
9. **PLEA THAT BOND WAS OBTAINED BY FRAUD** without alleging the facts constituting the fraud is bad. *Giles v. Williams*, 602.
10. **PLEA THAT BOND WAS MADE WITHOUT CONSIDERATION** is good in Alabama. *Id.*
11. **PLEA THAT CONSIDERATION OF BOND HAS FAILED** in that it was given for the purchase of land, but that no title or covenant of title was then or afterwards made, and that the plaintiff can not make title, is bad because it impliedly admits that the contract is not rescinded, and that the defendant has possession. *Id.*

See EXECUTORS AND ADMINISTRATORS, 1; OFFICES AND OFFICERS, 2;
USURY, 2, 3.

BOUNDARIES.

1. **WHERE A COMMITTEE TO SET OFF DOWER RUN OUT AND MARK ON THE GROUND** one of the lines which they intend as a boundary to the dower lands, the location so made will control a description of the same line, by courses and distances inconsistent therewith, in their return. *Griffin v. Bizby*, 225.
2. **NATURAL BOUNDARIES CONTROL NUMBER OF ACRES**, especially where the number is stated with a "more or less." *Bullard v. Coppe*, 561.

3. **NEW TRIAL WILL BE GRANTED MORE READILY FOR ERROR IN DECIDING QUESTIONS OF LOCATION** of boundary lines, inasmuch as such questions are legal in their character. *Felder v. Bonnett*, 545.
4. **NATURAL BOUNDARIES PREVAIL EXCEPT WHEN THEY ARE ENVELOPED IN DOUBT**, in which case artificial marks, though of inferior degree, will have effect. *Id.*
5. **SURVEY CALLING FOR A BOUNDARY DESIGNATED AS "DEAN SWAMP,"** includes the land to the flowing stream or current of the swamp where such exists, and does not extend merely to the external line of the low and marshy ground. *Id.*

See EVIDENCE, 13.

CAVEAT EMPTOR.

See VENDOR AND VENDEE, 3.

CHAMPERTY.

- IT IS CHAMPERTOUS FOR A TENANT** to sell the land in his possession at any time after the fact of his disclaimer is known to the landlord. *Bullard v. Coppe*, 561.

CITIZENSHIP.

See ALIENS.

COMMON CARRIER.

1. **WAGONER CARRYING GOODS FOR HIRE IS COMMON CARRIER**, though that is not his principal business, but only an occasional and incidental employment. *Gordon v. Hutchinson*, 464.
2. **COMMON CARRIER IS LIABLE FOR THE LOSS OF A PACKAGE** containing goods of great value, though ignorant of its contents, unless he has limited his liability by a special acceptance. *Relf v. Rapp*, 528.
3. **FRAUD, CARELESSNESS, OR DECEIT OF THE OWNER OF MERCHANDISE** by which a carrier is misinformed as to the true character of the contents of a package, and induced to regard it as being of no particular value, and to become less vigilant and attentive in regard to its security, will excuse the carrier from liability for loss of the goods, it appearing that the package was broken into during the transit, and articles of great value taken therefrom. *Id.*
4. **SHIPPER IS NOT BOUND ORDINARILY TO DISCLOSE THE VALUE OF GOODS** shipped in packages, unless inquiry be made of him by the carrier; but the shipper must not employ means calculated to induce the carrier to believe the goods to be different from what they actually are, or to suppress inquiry as to their character and value. *Id.*
5. **IF A PACKAGE CONTAINING JEWELRY BE LABELED "GLASS,"** the label will be presumed to have been intended to apprise the carrier of the true nature of the goods, and to dispense with the necessity of additional inquiry. *Id.*
6. **COMMON CARRIERS ARE LIABLE FOR LOSS ARISING BEFORE DELIVERY.** This principle was applied to a case where the goods in question arrived at their destination at sundown Saturday evening, but were not delivered, the plaintiffs declining to receive them, it being so late, and directing them to be placed on a sideling, where they remained until Monday

morning, locked in the cars, to which defendants had the keys; the loss occurred between Saturday night and Monday morning. *Eagle v. White*, 434.

See FERRIES, 2; USAGE, 3.

CONFLICT OF LAWS.

1. **CONFLICT OF LAWS.—VALIDITY OF A CONTRACT** is to be determined by the law of the place where it was executed, and in the absence of an express or necessary understanding that the contract is to be elsewhere performed, the place of performance is presumed to be the place of execution. *Allehouse v. Ramsay*, 417.
2. **DEBTOR IS NOT BOUND TO TENDER PERFORMANCE WITHOUT THE STATE** where there is no stipulation in regard to the place of performance. *Id.*
3. **THE LAW OF THE FORUM WHERE A CONTRACT IS MADE** governs its obligation. *Lane v. Levillian*, 769.

See JUDGMENTS, 14; STATUTE OF LIMITATIONS, 8.

CONSIDERATION.

See BONDS, 10, 11; CONTRACTS, 3.

CONSTABLES.

See EXECUTIONS, 17, 18, 21, 23.

CONSTITUTIONAL LAW.

1. **GRANT OF ADDITIONAL PRIVILEGES TO A CORPORATION IS NOT AN INVASION OF THE CONTRACT** between it and subscribers to its capital stock, although the amount for which the stockholder was formerly liable may be thereby increased. *Gray v. Monongahela N. Co.*, 500.
2. **CONSTITUTIONAL LIMITATION ON POWER TO PASS LAWS IMPAIRING OBLIGATION OF CONTRACTS** has reference to direct and not to merely consequential invasions of it. *Id.*
3. **OBLIGATION OF CONTRACT IS NOT IMPAIRED BY A LAW** which merely varies its consequences without changing the essence and character of the contract, or altering the nature of the obligation created by it. *Id.*
4. **ACT IS NOT UNCONSTITUTIONAL** which removes a limitation imposed by a prior act of incorporation upon the power of a corporation to incur a debt. *Id.*
5. **UNITED STATES MAY SUE IN THEIR OWN NAME** on a note indorsed to them, whether it is negotiable in form or not. *United States v. White*, 374.
6. **THE STATE MAY RESERVE THE RIGHT TO EXECUTE AND SERVE PROCESS** in any territory which she may cede to the United States. *State v. Dimick*, 197.
7. **AN ACT ESTABLISHING A COUNTY IS UNCONSTITUTIONAL** where the boundaries do not contain the number of acres prescribed by the constitution. *Bradley v. Commissioners*, 563.
8. **QUO WARRANTO IS THE COMMON LAW MODE** of redressing an evil like that of seeking to establish a county under an unconstitutional act; but now by a bill in chancery any one aggrieved may enjoin the proceedings. *Id.*
9. **THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES** upon all questions involving the construction of the constitution of the general

government, the acts of congress and foreign treaties made in pursuance of its authority, are binding upon and will be followed by this court. *McFarland v. State Bank*, 761.

10. NOTES ISSUED BY A BANK ARE NOT "BILLS OF CREDIT," within the prohibition contained in the national constitution against the emission of such bills, by the respective states, though the state is the sole stockholder in the bank, and has unlimited control over its affairs through its legislature, and though it has made the notes of the bank receivable in payment of taxes. *Id.*

See CORPORATIONS, 7; EMINENT DOMAIN; HABEAS CORPUS, 5.

CONTRACTS.

1. CONTRACTS FOR PERFORMANCE OF PERSONAL MANUAL LABOR, requiring health and strength, are subject to the implied condition that health and strength remain. *Dickey v. Linscott*, 68.
2. WHEN PARTY MAKING CONTRACT FOR PERFORMANCE OF TERM OF WORK is prevented from entering on the work at the stipulated time by an act of God, and the disability thus produced lasts during the greater portion of the term, he will be excused from performing the work during the remainder of the term. *Id.*
3. LEGAL CONSIDERATION, WHAT SUFFICIENT.—A loss or damage to the promisee is as good a legal consideration to support a note, as a benefit to the promisor. *Chick v. Trevett*, 68.
4. PURCHASER IS ENTITLED TO RESCIND a contract for the sale of real estate, if such estate is taken from him in consequence of an incumbrance made by his vendor and unknown to him at the time of the purchase. *Cullum v. Branch Bank*, 725.
5. RIGHT TO SUE ON INDENTURE FOR BENEFIT OF THIRD PERSON is, at law, confined to the parties to it; the beneficiary can not sue on it. *Ross v. Milne*, 646.
6. PAROL CONTRACT FOR BENEFIT OF THIRD PERSON confers no rights on the third person, unless there has been an executed gift, or he has paid a valuable consideration. *Id.*
7. ASSUMPSIT IS PROPER REMEDY TO RECOVER ON CONTRACTS of third persons, and not debt. *Id.*
8. WRITTEN CONTRACT MAY BE ALTERED BY SUBSEQUENT PAROL AGREEMENT, where the alteration is made on a good consideration and before any breach of the contract. And, in an action for a breach of the written contract, such alteration may be proved, although the oral agreement be within the operation of the statute of frauds. *Cummings v. Arnold*, 155.

See USURY, 1.

CONVERSION.

See TROVER.

COPARCENERS.

See CO-TENANCY, 1.

CORPORATIONS.

1. ACTS OF A DIRECTOR OF A CORPORATION ARE VALID so far as the interests of third persons are concerned, though he is not possessed of the qualifica-

tions required by the by-laws of the corporation, if his election appear of record and he has been permitted by the corporation to act as director. *Despatch Line v. Bellamy Mfg. Co.*, 203.

2. **MAJORITY OF THE DIRECTORS OF A CORPORATION** may exercise the powers conferred upon their body by the by-laws of the corporation; but this they can do only after there has been a joint consultation at which all the directors were present, or after there has been a regular meeting at which all might have been present, and at which a majority did meet and act. *Id.*
3. **ACT PURPORTING TO BE THE ACT OF THE BOARD OF DIRECTORS** of a corporation is presumed to have been properly executed, but the presumption may be rebutted. *Id.*
4. **AUTHORITY TO CONVEY THE REAL ESTATE OF A CORPORATION MAY BE CONFERRED BY VOTE** of the board through whom its business is transacted. *Id.*
5. **THE ACT OF A MAJORITY OF THE DIRECTORS OF A CORPORATION**, to be of any effect as the act of the corporation, must have been expressed at a regular notified meeting at which all the directors might have been present. *Elliot v. Abbot*, 227.
6. **LIMITATION OF THREE YEARS PRESCRIBED FOR ACTIONS UPON STATUTES** by parties aggrieved to recover benefits secured thereby, under the New York statute of limitations, does not, it seems, apply to a bill filed by creditors of a corporation, under a provision in its charter to charge the stockholders with payment of its debts. *Van Hook v. Whitlock*, 246.
7. **DEBTS CREATED PRIOR TO PASSAGE OF ACT DISCHARGING INSOLVENT CORPORATIONS** and their stockholders from all their corporate liabilities upon making the assignment therein prescribed, are exempt from the operation of a discharge under such act, because, as to them, the act is unconstitutional; but a creditor accepting a dividend under the assignment waives the benefit of the exemption and his debt is barred. *Id.*
8. **WHERE ACT AUTHORIZES CORPORATION TO ERECT DAM** at the head of a harbor, the corporation may erect a dam there though it is below the highest point to which the tide usually flowed. *Parker v. Cutler Mill-dam Co.*, 56.
9. **PROVISION IN ACT THAT CORPORATION MUST BUILD "ON THEIR OWN LAND"** does not limit nor designate the place of building; its intent is to prevent any inference that the legislature intended to authorize the corporation to take the land of others for that purpose. *Id.*
10. **CANAL COMPANY IS NOT A PUBLIC CORPORATION**, public corporations being only political corporations, or those founded solely for public purposes, the whole interest therein being in the public. *Ten Eyck v. Del. & R. Canal Co.*, 233.
11. **CANAL COMPANY IS LIABLE IN DAMAGES FOR OVERFLOWING LANDS** near to but not adjoining the canal, by obstructing the natural flow of streams through such lands, and its charter authorizing the construction of the canal is no justification. *Id.*
12. **MISTAKE OF CORPORATE NAME IN NOTICE TO STOCKHOLDER** calling for payment of his installment of an assessment does not vitiate it. *Gray v. Monongahela N. Co.*, 500.
13. **MISNOMER OF CORPORATION IN THE PLEADINGS** in an action brought by it against a stockholder to recover the amount of his assessment, can not be taken advantage of unless specially pleaded in abatement. *Id.*

14. CORPORATION CAN NOT COMMIT A CRIME OR MISDEMEANOR, nor by any positive or affirmative act, as a corporation, incite others to do so. *State v. Great Works Milling & Mfg. Co.*, 38.
 15. WHEN CRIME OR MISDEMEANOR IS COMMITTED UNDER COLOR OF CORPORATE AUTHORITY, the individuals, and not the corporation, should be indicted. *Id.*
 16. CORPORATION CAN NOT BE INDICTED FOR A NUISANCE for obstructing a navigable river; in such a case the remedy is against those persons by whose procurement the nuisance was erected. *Id.*
- See CONSTITUTIONAL LAW, 1; PLEADING AND PRACTICE, 2, 4, 5; STATUTE OF FRAUDS, 4; WATERCOURSES, 3.

COSTS.

COSTS INCURRED BY A GUARDIAN in an action to determine the validity of a deed affecting the property in which his ward has an interest, are to be paid out of the property of the ward. *Ramsay v. Joyce*, 550.

See EXECUTIONS, 18, 21, 22; TENDER, 2.

CO-TENANCY.

1. WHERE AN ESTATE DESCENDS TO SEVERAL they are coparceners, without reference to the question whether they are males or females. *Campbell v. Wallace*, 219.
 2. IF ONE TENANT IN COMMON SELL THE COMMON PROPERTY, his co-tenants may adopt the sale, and all the co-tenants may join in an action therefor in assumpsit for goods sold and delivered. *Putnam v. Wise*, 309.
 3. EXCLUSIVE POSSESSION BY ONE TENANT IN COMMON AND RECEIPT OF THE RENTS AND PROFITS of the common land for a great length of time, is not sufficient to create a legal presumption of the actual ouster of a co-tenant. *Bolton v. Hamilton*, 509.
 4. WHETHER AN OUSTER RESULTS FROM SUCH POSSESSION and occupancy is a question of fact to be determined by the jury. *Id.*
- See ADVERSE POSSESSION, 4; DISSEISIN, 2, 3; LANDLORD AND TENANT, 1, 2, 4, 5; PARTITION, 1.

COUNTIES.

See CONSTITUTIONAL LAW, 7; JUDGMENTS, 12.

COVENANTS.

1. INDEPENDENT COVENANTS—WHERE A DAY IS FIXED FOR THE PAYMENT OF MONEY, which is to happen before the performance of that which is the consideration of the payment, the covenant for payment is independent, and may be enforced, though there has been no performance of the consideration. Within this rule an agreement to pay an installment of the purchase price of land is independent of the covenant of the vendor to convey the title after the entire purchase price has been paid. *Coleman v. Rowe*, 164.
2. IDEM.—EQUITY WILL NOT ENJOIN THE COLLECTION OF AN INSTALLMENT of the price due on a sale of lands, the title to which is to be made by warranty deed, after the entire price has been paid, upon the ground

- that the vendor has no title, where the latter has been guilty of no fraud, and the vendee has not been evicted from the tract sold. *Id.*
3. IN ACTION FOR BREACH OF COVENANT OF SEISIN the defendant may offer in evidence deeds to himself subsequent to his deed to plaintiff to defeat the action, as these deeds inure to the plaintiff by virtue of the general covenant of warranty in his deed. *Baxter v. Brudbury*, 49.
 4. WHERE PARTY ACQUIRES TITLE AFTER CONVEYANCE WITH GENERAL WARRANTY, the title thus acquired inures to the benefit of his grantee, and the grantee then has no right to elect whether or not to reject the title. *Id.*
 5. DAMAGES ARE NOMINAL, THOUGH WARRANTOR HAD NOT THE TITLE when he made his conveyance, if before recovery against him he has obtained the title. *Id.*
 6. VENDOR BY OFFERING TO SELL AN ESTATE virtually represents that it is or shall be unimpaired by any act of his, and free of incumbrances created by himself. *Cullum v. Branch Bank*, 725.
 7. COVENANTS ARE INDEPENDENT, if by their terms the time of performance of one is so fixed, that it is to happen, or may happen, before the performance of the other. Thus if a day certain is fixed for the payment of money, but no day is mentioned for the execution of the conveyance of which it is the consideration, an action may be maintained for the money, though the deed has not been executed, and though there has been a demand made for it. *Sayre v. Craig*, 757.
 8. WHERE A COVENANT goes only to a part of the consideration of another covenant, and its non-performance may be paid for in damages, the latter covenant is independent thereof, and an action may be maintained thereon without averring performance of the first. *Id.*

See LANDLORD AND TENANT, 3, 11; SALES, 3.

CRIMINAL LAW.

1. RULE THAT INDIOTMENT MUST NEGATIVE EXCEPTIONS IN STATUTE does not apply to a case where the charge preferred *ex natura rei* conclusively imports a negative of the exceptions. *State v. Price*, 81.
2. LARCENY OF ARTICLES BELONGING TO DIFFERENT OWNERS, if at the same time and place, constitutes but one offense. *Lorton v. State*, 179.
3. LARCENY—THE FINDER OF A POCKETBOOK CONTAINING BANK BILLS, but having no mark on or about it, by which the name of the owner could be ascertained, can not be convicted of larceny, though the book was immediately demanded by the owner, and the finder denied having it and concealed and fraudulently converted the bills, unless it further appears that the finder, when he acquired possession, knew who the owner was, or had the means of identifying him *instantly* by marks on or about the property. *People v. Cogdell*, 297.
4. DISTINCTION BETWEEN MURDER IN SECOND DEGREE AND MANSLAUGHTER is that malice is a necessary ingredient of the former, while in the latter it is wanting. *Slaughter v. Commonwealth*, 638.
5. WHERE DECEASED MADE AN ASSAULT ON PRISONER, and the latter shot and killed him, not in consequence of the passion produced by the assault, but on account of a previous malice and determination to kill him, the crime is murder, and not manslaughter. *Id.*

6. **CONVICTION BEFORE JUSTICE OF PEACE, AND PERFORMANCE OF SENTENCE IMPOSED**, constitute a bar to an indictment for the same offense, although the judgment upon which the sentence was rendered was so defective that it would have been reversed on error. *Commonwealth v. Loud*, 139.
- See **ALIENS**, 2; **CORPORATIONS**, 14-16; **HABEAS CORPUS**, 1-4, 6; **INFANCY**, 3; **INTERNATIONAL LAW**, 11, 12, 14, 17, 18; **JURY AND JURORS**; **MARRIAGE AND DIVORCE**.

DAMAGES.

- See **ATTORNEY AND CLIENT**, 7; **AUCTIONS**, 2; **COVENANTS**, 5; **SALES**, 6; **VENDOR AND VENDEE**, 7, 11; **WATERCOURSES**, 1.

DAMS.

- See **WATERCOURSES**, 2.

DEBT.

- See **JUDGMENTS**, 15.

DECEIT.

1. **DECEIT WILL NOT LIE FOR FALSE REPRESENTATIONS** where the plaintiff by reasonable diligence could have informed himself of the truth of the matter. *Saunders v. Hatterman*, 404.
2. **WHERE VENDOR MISREPRESENTS VALUE OF LAND** lying in a neighboring county, the vendee can not maintain an action for deceit though he has never seen the land, as he has it in his power to ascertain its value. *Id.*

DECLARATIONS.

- See **EVIDENCE**, 11-13.

DEEDS.

1. **EXECUTION OF DEED AND DELIVERY THEREOF TO REGISTER** for the purpose of registration, without delivery to the grantee, vests no title in him, and nothing passes thereby. *Samson v. Thornton*, 135.
2. **DEED OF LAND EXECUTED, ACKNOWLEDGED, AND DELIVERED TO THIRD PERSON** to be by him delivered to the grantee after the grantor's death, when so delivered, takes effect as from the date of the first delivery, and divests the estate of the grantor as from that time. *Foster v. Mansfield*, 154.
3. **A QUITCLAIM DEED IS PERFORMANCE OF CONTRACT TO GIVE GOOD TITLE**, if the vendor had the title. *Pugh v. Chesseldine*, 414.
4. **WHERE DEED IS SEALED AND DELIVERED AS AN ESCROW** to the party himself to whom it is made, but to become the deed of him who sealed it on certain conditions, the delivery is absolute, and the deed shall take effect presently as his deed, and the party is not bound to perform the conditions. *Hicks v. Goode*, 677.
5. **IDEM—WHERE DEED ON ITS FACE IS NOT COMPLETE**, but requires some further act to execute it, delivery of it to the party to whom it is to be made is not absolute, and it remains in his hands subject to the performance of the act. *Id.*
6. **A RECORDED DEED IS NOT OF ITSELF EVIDENCE** of the grantor's title. *Potter v. Washburn*, 615.

7. **HEIRSHIP MUST BE PROVED** other than by recitals in a deed of recent date, in order to furnish a foundation for title to land. *Id.*
8. **WHERE GRANTOR RESERVES RIGHT OF INGRESS AND EGRESS THROUGH A GATE** or passage way about five feet in width, for carrying and recarrying wood or any other thing to and from an adjoining house of the grantor, this amounts to the reservation of the right of a suitable and convenient passage for the purposes indicated, but does not definitely determine the exact width of the passage way. And if the grantor and those who claim under him have used such passage nearly in conformity with the terms of the reservation, they will be deemed to have held under the reservation, not adversely thereto, and they will be limited by its terms. *Atkins v. Bordman*, 100.
9. **WHERE DIMENSIONS OF A WAY RESERVED ARE NOT EXPRESSED**, but the object of the reservation is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object. *Id.*
10. **OWNER OF LAND OVER WHICH HIS GRANTOR RESERVED A PASSAGE WAY** may cover in that way by building over it, provided he leave a space high and wide enough, and sufficiently well lighted, to answer reasonably well the purpose for which such passage way was reserved. *Id.*
11. **WHERE GRANTOR IN CONVEYING TENEMENT ADJOINING HIS OWN** expressly stipulates that his grantee shall not erect any building nearer to the grantor's than a certain prescribed limit, such stipulation will not prevent the grantee from building a tenement higher than the old one, although by so doing he may lessen the amount of light and air coming to the windows of his grantor. *Id.*

See **ADVERSE POSSESSION**, 2; **BOUNDARIES**; **DISSEISIN**, 1, 2; **EQUITY**, 10; **ESTOPPEL**, 1; **EXPECTANCIES**; **LIENS**, 5.

DEEDS OF TRUST.

See **DOWER**, 1-3; **MORTGAGES**, 9.

DELIVERY.

See **ARBITRATION AND AWARD**, 4, 5; **COMMON CARRIERS**, 6; **DEEDS**, 1, 4, 5; **SALES**; **SPECIFIC PERFORMANCE**, 8.

DEMAND.

See **NEGOTIABLE INSTRUMENTS**, 19; **SURETYSHIP**, 10; **TROVER**; **USAGE**, 2.

DEVISES.

See **WILLS**, 8.

DISSEISIN.

1. **DEED OF DISSEISER, WHILE THE DISSEISIN IS STILL SUBSISTING**, conveys no title. *Parker v. Proprietors*, 121.
2. **DISSEISIN OF ONE CO-TENANT BY ANOTHER, WHAT AMOUNTS TO.**—Where one co-tenant conveys the whole estate, and the grantee records the deed and enters into open and notorious possession, claiming title to the entire estate, this will amount to a disseisin by such grantee, of the other co-tenants. *Id.*

2. A DISSEISOR PURCHASING FROM A CO-TENANT can not be ousted by a co-tenant until he commits some disseisin of the plaintiff. *House v. Fuller*, 588.

See PLEADING AND PRACTICE, 17, 18.

DOMICILE.

1. DOMICILE OF A MINOR CHILD IS AT THE DOMICILE OF ITS PARENTS during their life-time, and should the mother survive the father, the child's domicile follows that of its mother during her widowhood. *School Directors v. James*, 525.
2. DOMICILE OF A GUARDIAN IS NOT NECESSARILY THE DOMICILE OF HIS WARD. *Id.*

DOWER.

1. DECEASED MORTGAGOR'S WIFE IS ENTITLED TO DOWER IN SURPLUS only of the proceeds of the mortgaged premises, after paying the mortgage debt and costs of foreclosure, where she has joined in a mortgage of his land for his debt, and the land has been sold on foreclosure, and can not claim dower in the whole proceeds against judgment creditors of the husband; but her interest in the residue is free of any charge for the costs of a reference to determine the rights of the creditors therein. *Hawley v. Bradford*, 390.
2. DEED OF TRUST IS SUPERIOR TO RIGHT OF DOWER, when it is given to secure the payment of the purchase price. *Wheatley v. Calhoun*, 654.
3. RIGHT OF DOWER WHERE PROPERTY SOLD UNDER TRUST DEED would attach to the husband's share of the proceeds after the debt secured was paid. *Id.*

See BOUNDARIES, 1;

DRAFTS.

See NEGOTIABLE INSTRUMENTS, 2.

EASEMENTS.

1. OWNER OF ESTATE IN FEE IN WHICH ANOTHER HAS AN EASEMENT has still all the beneficial use which he can have consistently with the other's enjoyment of such easement. *Atkins v. Bordman*, 100.
2. ONE CAN NOT ENTER ON LAND OF ANOTHER TO REPAIR A DRAIN running from the former's house through the latter's lot, where the drain was made by the former owner, who conveyed both lots by different deeds executed simultaneously, without mentioning right of drainage through the lot, and where another drain from said house may, with a reasonable outlay, be constructed without passing through said lot. *Johnson v. Jordan*, 85.
3. RIGHT TO RUN DRAIN THROUGH ANOTHER'S LAND can be created by actual use, only where such use has been adverse, peaceable, uninterrupted, and continued for a period of twenty years. *Id.*

See DEEDS, 8-11.

EJECTMENT.

- IN EJECTMENT DEFENDANT MAY SHOW TITLE OUT OF PLAINTIFFS, though he does not connect himself with it, if he did not enter under them. *Bloom v. Burdick*, 299.

See JUDGMENTS, 9, 10, 13; PARTITION, 2; STATUTE OF LIMITATIONS, 4.
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EMINENT DOMAIN.

STATE MAY APPROPRIATE PROPERTY for public use on making due compensation, but can not appropriate it to a private use except by the owner's consent. *Ten Eyck v. Del. & R. Canal Co.*, 233.

EQUITY.

1. **EQUITY WILL NOT ENJOIN A JUDGMENT AT LAW** upon any ground which either was tried or might have been tried at law. *Emerson v. Udall*, 604.
2. **EQUITY WILL INTERFERE** where a party has failed of an opportunity to present his defense by accident, mistake, or fraud of the opposite party, or where the ground of defense was of an equitable character. *Id.*
3. **AWARD WILL BE SET ASIDE IN EQUITY** for partiality or corruption of the arbitrators, or perhaps where the party knowingly has presented a fictitious claim. *Id.*
4. **EXECUTION DEBTOR CLAIMING THAT HE HAS NOT BEEN CREDITED** on the execution for a certain sum collected by garnishment from one of his debtors, can not have relief in equity unless it satisfactorily appears that the creditor is attempting to coerce payment a second time. *Abercrombie v. Knox*, 721.
5. **PURCHASER IS ENTITLED TO RELIEF IN EQUITY ON THE GROUND OF FRAUD**, although he has taken a covenant from his vendor which covers the precise injury sustained. *Oullum v. Branch Bank*, 725.
6. **RELIEF IN EQUITY WILL BE GIVEN A PURCHASER OF LANDS** against his obligation to pay the purchase money, if it appear that he holds under a conveyance, with covenants of warranty, that he has been evicted by title paramount, and that his grantor is insolvent. *Id.*
7. **FRAUD ON THE PART OF THE VENDOR** may entitle the vendee to relief in equity, as where the former, being aware of a defect in the title, concealed it from the latter, or suppressed an instrument by which an incumbrance had been created. *Id.*
8. **PARTY ENTITLED TO RELIEF IN EQUITY THOUGH REMEDY AT LAW EXISTS**, where on account of a mistake in drawing up the instrument intended to secure the remedy, it is not as full, adequate, and complete as the one contemplated by the parties. *Newcomer v. Kline*, 74.
9. **WHERE WORD "DOLLARS" WAS OMITTED FROM BILL SINGLE**, by mistake, so that a party was deprived of the specific security intended to be given thereby, he will be granted relief in equity. *Id.*
10. **EQUITY WILL NOT AID GRANTEE IN DEED WHICH IS FRAUDULENT** in fact, and would therefore be declared void in a court of law as against the grantor's creditors, because, though absolute in its terms, it was really intended merely as security for a debt not exceeding one fifth of the consideration expressed, and the grantee can not maintain a bill against a creditor of the grantor subsequently purchasing the land on execution on his own judgment, to have such deed declared a security for the amount really due, and to subject the premises to payment thereof. *Moore v. Tarlton*, 701.
11. **NO GENERAL PRINCIPLE IN REGARD TO MULTIFARIOUSNESS** can be extracted from the cases; on the one hand, multiplicity of actions is to be avoided, and on the other hand, the blending in one suit of distinct and incongruous claims and liabilities. *Johnson v. Brown*, 553.

12. **A BILL IS BAD FOR MULTIFARIOUSNESS** which joins as parties defendant a partner, the firm of which he is a member, the several trustees to whom they have separately assigned property in trust for the benefit of creditors, and the creditors respectively affected by the deeds of trust. *Id.*
13. **PRACTICE ON DEMURRER FOR MULTIFARIOUSNESS.**—On the sustaining of a demurrer for multifariousness, the complainant may dismiss as to those whose joining made the bill bad, and proceed as to the rest. But, if he appeals without so doing, the appellate court on sustaining the lower court can only dismiss the bill without prejudice. *Id.*
- See ACCORD AND SATISFACTION, 2; AUCTIONS, 4; COVENANTS, 2; HUSBAND AND WIFE, 2, 3, 5; JUDGMENTS, 15; PARTNERSHIP, 6; SURETYSHIP, 4; VENDOR AND VENDEE, 2.

ESCROWS.

See DEEDS, 2, 4, 5.

ESTOPPEL.

1. **CONVEYANCE BY MORTGAGOR AND MORTGAGEE.**—Where the mortgagee joins with the mortgagor in a deed conveying the mortgaged premises, together with a smaller parcel owned by the mortgagee in severalty, the deed containing a covenant that the premises are free from incumbrances, he will be estopped to assert his mortgage, the deed making no exception of it, and he not giving the purchaser notice that he claimed any title. *Durham v. Alden*, 48.
2. **ESTOPPEL.—ACKNOWLEDGMENT OF SUFFICIENCY OF AUTHORITY OF AN AGENT** to make a demand does not estop the party from afterwards showing that the authority was revoked, when the demand was made, by the death of the principal. *Gale v. Tappan*, 194.

See JUDGMENTS, 2, 3.

EVICTIION.

See VENDOR AND VENDEE, 4.

EVIDENCE.

1. **COURT JUDICIALLY KNOWS WHAT A BILLIARD TABLE IS**, and that it is not a table at which faro is usually played. *State v. Price*, 81.
2. **EVIDENCE OF IDENTITY OF A PERSON UPON WHOM DEMAND OF PAYMENT** has been made with the maker of a note is sufficient, if it appear that a demand was made at the latter's office upon a person who acknowledged his signature to the note, appeared familiar with the transaction, and placed his refusal to pay upon the ground that there had been trouble about the note; though the party presenting, not knowing the maker, is unable to testify positively that the demand was made upon him. *Gale v. Tappan*, 194.
3. **PAROL EVIDENCE NOT ADMISSIBLE TO EXPLAIN PATENT AMBIGUITY.** *Newcomer v. Kline*, 74.
4. **PAROL EVIDENCE OF CONTENTS OF BILL OF EXCHANGE** is admissible in an action against the executors of the drawee for refusing to accept it, after notice to them to produce it, though they deny having received it, where it appears to have been left with the testator and is not shown to have been returned. *Kennedy v. Geddes*, 714.

6. ON PLEA OF FORMER RECOVERY PAROL EVIDENCE is admissible to show, that on the trial in ejectment, the title was not litigated, or to establish the identity of the land. *Parks v. Moore*, 589.
 6. IN SUCH CASE JURORS on the former trial may testify. *Id.*
 7. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A RECEIPT, and to show to what demands it was meant to apply. *Brooks v. White*, 95.
 8. WHERE LANGUAGE OF DEED IS DEFECTIVE OR AMBIGUOUS, it is competent, in order to show what the parties probably meant, to prove the local position, the relative situation of the estate granted and of that reserved, and also the manner in which the grantor himself used it when owner of the whole. *Atkins v. Bordman*, 100.
 9. DOCKET OF A JUSTICE OF THE PEACE IS THE BEST EVIDENCE of the proceedings had in an action before him, and of the nature and cause thereof, and parol evidence is not admissible to vary or contradict it. *Coffman v. Hampton*, 511.
 10. EVIDENCE OF CLAIM AGAINST WHICH STATUTORY TIME has run is admissible, because the plaintiff may produce other evidence taking it out of the operation of the statute. *Finney v. Cochran*, 450.
 11. DECLARATIONS OF A GRANTOR IN POSSESSION are not admissible to defeat the grantee's title, where such declarations were not of a character explaining or qualifying the possession. *Carpenter v. Hollister*, 612.
 12. DECLARATIONS OF A TENANT IN POSSESSION AGAINST HIS INTEREST are evidence against a party claiming under him, but his declarations after he had parted with his interest are not admissible. *Felder v. Bonnett*, 545.
 13. DECLARATIONS OF A PARTY AFTER A CONVEYANCE OF LAND BY HIM respecting the location of a boundary line are not admissible against his successor in interest. *Id.*
 14. SECONDARY EVIDENCE MAY BE GIVEN OF CONTENTS OF PAPER which has been superseded by execution of a new agreement between the parties thereto, touching the same subject-matter, where the party to whom it was surrendered makes affidavit that he has made diligent search for it, but can not find it, and that he supposes it to have been destroyed. *Oriental Bank v. Haskins*, 140.
 15. ATTESTATION OF CLERK TO TRANSCRIPT OF JUDGMENT OF ANOTHER STATE is sufficient under the act of congress of 1790, if it complies with the form prescribed for the court where the proceeding was had, and the certificate of the presiding judge is the only evidence of such compliance. *McRae v. Stokes*, 698.
 16. CLERK'S CERTIFICATE THAT RECORDS HAVE BEEN TRANSFERRED BY LAW to his court from the court in which the judgment was originally recovered, appended to a transcript of a judgment of another state, together with the presiding judge's certificate that the attestation is in due form, is sufficient evidence of such transfer without producing the law. *Id.*
 17. STATUTES WHETHER PUBLIC OR PRIVATE MAY BE PROVED by a copy of the laws in which they are included, as published by authority of the legislature of the state where they are in force. *Gray v. Monongahela N. Co.*, 500.
- See ATTORNEY AND CLIENT, 8-17; DEEDS, 6, 7; FRAUD, 1; FRAUDULENT CONVEYANCES, 1, 2; JUDGMENTS, 9, 13; MARRIAGE AND DIVORCE; NEGOTIABLE INSTRUMENTS, 15-17; PROBATE COURTS, 6; REPLEVIN, 2; USAGE, 3; WILLS, 5.

EXECUTIONS.

1. **EXECUTION ISSUED AFTER A YEAR AND A DAY** on a judgment which has not been revived by *scire facias* is but voidable, not void. *Mitchell v. Evans*, 169.
2. **PURCHASER AT A SALE UNDER A VOIDABLE EXECUTION** will be protected. *Id.*
3. **EXECUTION, ON A JUDGMENT AGAINST A GARNISHEE** on a debt not yet due, is stayed by operation of law until the debt does become due, and therefore the judgment need not be accompanied by an order of court directing the stay. *Anderson v. Wanser*, 170.
4. **A LEVY OF EXECUTION IS VOID FOR UNCERTAINTY** when made in the following words: "Levied on lot No. —, in the town of Greenville, with its improvements," and the sale conveys no title. *Brown v. Dickson*, 560.
5. **POSSESSION OF A LESSEE OF THE VENDEE IS ALSO THAT OF THE LATTER**, and the equitable estate thereby created may be taken in execution upon a judgment against the vendee. *Pugh v. Good*, 534.
6. **POTATOES NOT YET DUG FROM THE GROUND ARE EXEMPT** from execution under a statute exempting "necessary vegetables actually provided for family use." *Carpenter v. Herrington*, 239.
7. **EXEMPTION STATUTE IS REMEDIAL**, and should be liberally construed. *Id.*
8. **AMENDMENT OF SHERIFF'S RETURN SO AS TO SHOW NO PROPERTY FOUND** may be made, and when made relates back to the time when the process was returned, and authorizes proceedings against indorsees under the statute of Alabama. *Woodward v. Harbin*, 753.
9. **THERE IS NO PRESUMPTION THAT A SHERIFF RETURNED A WRIT** at any time prior to the date when the law required him to do so. *Id.*
10. **THE GENERAL ISSUE IS SUFFICIENT IN AN ACTION BY AN INDORSEE** against an indorser to put in issue the allegation that execution had been returned, no property found before the suit was commenced. A plea in abatement is not required in such case. *Id.*
11. **DEFENDANT IN AN EXECUTION CAN NOT SUSTAIN AN ACTION** against a marshal or sheriff for failure to levy the writ on the property of a co-defendant, although as between the co-defendants the latter was principal and the former surety. *Gregg v. Crawford*, 739.
12. **AN EXECUTION IS NOT KEPT ALIVE** in the sheriff's hands where the latter pays the amount thereof to the creditor, there being no agreement for the purchase of the debt. *Harwell v. Worsham*, 572.
13. **IF A SHERIFF HAVE A DEBT AGAINST THE EXECUTION DEFENDANT**, who places property in the former's hands to satisfy the executions, the sheriff can not pay his own debt before satisfying the writs. *Id.*
14. **FRAUDULENT PURCHASER AT EXECUTION SALE** gets no title as against a purchaser at a subsequent execution sale on another judgment against the same debtor, although a part of the proceeds of the first sale was applied by order of the court to the latter judgment, the owner thereof being innocent of any participation in the fraud. *Foult v. McFarlane*, 467.
15. **WHERE THE JUDGMENT CREDITOR'S ATTORNEY PURCHASES AT THE EXECUTION SALE**, the purchase will, at the creditor's election, be deemed to have been made for his benefit; but this election must be exercised within a reasonable time; twenty-five months is too long a time to wait. *Wade v. Pettibone*, 408.

16. OFFICER SELLING THE ENTIRE PROPERTY UNDER EXECUTION against one co-tenant thereof, abuses his legal authority and becomes liable as a trespasser *ab initio*, although in making the levy he was authorized to take exclusive possession of the property. *Waddell v. Cook*, 372.
 17. COURT MAY CHARGE THAT THE INFERENCE TO BE DERIVED from an arrangement between a constable and a purchaser at a sale under execution, by which the latter agreed to settle the following day for the price bid for the articles, is, that the intention of such arrangement contemplated a delivery of the goods by the constable at such time, and a payment therefor of the sum bid, by the purchaser. *Coffman v. Hampton*, 511.
 18. CONSTABLE'S COSTS AND CHARGES FOR KEEPING THE PROPERTY up to the time stipulated for payment, become part of the terms of the sale, for which the purchaser is liable. *Id.*
 19. FAILURE OF PURCHASER TO MAKE OR OFFER PAYMENT within the time agreed, is a default upon his contract, for which he is liable. *Id.*
 20. VENDOR MAY RESELL AFTER DEFAULT of purchaser in paying the sum bid by him for goods within the time agreed. *Id.*
 21. PURCHASER IS LIABLE FOR THE CONSTABLE'S COSTS AND CHARGES in addition to the purchase price offered at the prior sale, if the proceeds of the resale are not sufficient to cover the entire amount. *Id.*
 22. TENDER OF PURCHASE PRICE AFTER DEFAULT by failure to make payment at the time agreed upon, is insufficient unless the costs and expenses of the vendor in taking care of the property up to that time be also tendered. *Id.*
 23. PURCHASER AT CONSTABLE'S SALE CAN NOT SET OFF in an action against him to recover a deficiency after a resale, a claim against the constable for rent due him as landlord from the defendant in the former suit, whose goods in the hands of the constable or the proceeds of the sale thereof it is insisted are liable for its payment. *Id.*
- See EQUITY, 4; FIXTURES, 5, 7, 8; INSURANCE, 6; JUSTICES OF THE PEACE; SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. OMISSION OF SURETY FROM ADMINISTRATOR'S BOND does not make void the grant of letters to him. *Bloom v. Burdick*, 299.
2. WHERE EXECUTOR UNDER LICENSE FROM COURT to sell real estate for the payment of debts, sells a greater quantity than is authorized by the license, the sale is invalid. *Wakefield v. Campbell*, 60.
3. ADMINISTRATOR IS PERSONALLY LIABLE on a note which he signs as administrator of the deceased. *Davis v. French*, 36.

See PLEADING AND PRACTICE, 6.

EXEMPTIONS.

See EXECUTIONS, 6, 7.

EXPECTANCIES.

1. WHERE AN HEIR APPARENT CONVEYS HIS ESTATE IN FEE SIMPLE, and covenants in the deed that neither he nor those claiming under him, will ever claim any right in such estate, this covenant, which amounts to a warranty, will bar him and those claiming under him, when the right descends. *Trull v. Eastman*, 126.

2. **RELEASE OF ALL RIGHT, TITLE, OR INTEREST OF RELEASOR** in his father's estate, whether the same fall to him by will or heirship, embraces all the right which he may afterwards acquire as well as what present right he has. *Id.*

FALSE PRETENSES.

See **INFANCY**, 3.

FERRIES.

1. **LICENSED FERRYMAN HAS NO AUTHORITY TO PLACE ROPE ACROSS A NAVIGABLE STREAM** which obstructs navigation, and if he does so, he is liable for any injury resulting therefrom. *Babcock v. Herbert*, 695.
2. **KEEPER OF PUBLIC FERRY IS LIABLE AS A COMMON CARRIER.** *Id.*

FISHING.

See **WATERCOURSES**, 4.

FIXTURES.

1. **MACHINERY CONTAINED IN A MILL OR FACTORY IS PART OF THE REALTY**, whether it is made fixed and stationary by physical means, or is detached, if it is machinery which is employed in and devoted to the business. *Voorhis v. Freeman*, 490.
2. **ACTUAL AND PERMANENT ANNEXATION TO THE FREEHOLD** is necessary to give a particular article the character of a fixture in dwelling-houses; but in the case of machinery employed in the business of manufacturing, no actual physical attachment to the realty is essential. *Id.*
3. **MACHINERY WHICH IS A CONSTITUENT AND INTEGRAL PART OF A FACTORY**, and necessary in order to maintain and carry on the business, is constructively attached to the building in which it is stationed, and passes as part of the freehold. *Id.*
4. **BETWEEN VENDOR AND VENDEE, HEIR AND EXECUTOR**, debtor and execution creditor, such machinery is considered as a part of the freehold, although as between a tenant and the landlord or remainder-man a different principle would no doubt prevail. *Id.*
5. **SALE UNDER A LEVARI FACIAS OF A LOT OF GROUND** and the iron rolling mill situated thereon, together with the apparatus, steam-engine, boilers, and bellows attached to the establishment, passes the iron rolls used in the mill, though they were not attached, but were lying loosely in the place where kept, to be used when required, and the latter can not be thereafter levied upon and sold under *ieri facias* against the former judgment debtor. *Id.*
6. **OWNER OF FREEHOLD MAY AGREE THAT A FIXTURE** shall be severed from the freehold and belong to another, and after such agreement the fixture is deemed personal property. *Foster v. Mabe*, 749.
7. **HOUSE WHICH THE OWNER OF LAND AGREES SHALL BELONG TO ANOTHER** is subject to execution against the latter. *Id.*
8. **SHERIFF'S SALE IS NOT VOID BECAUSE THE PROPERTY SOLD WAS NOT PRESENT.** The sale may be set aside on that ground; but, if not set aside, is valid. *Id.*
9. **THE RULE WITH REGARD TO FIXTURES THAT APPLIES BETWEEN HEIR AND EXECUTOR** also applies between vendee and vendor, and mortgagee and mortgagor. *Despatch Line v. Bellamy Mfg. Co.*, 203.

10. **FIXTURES, MACHINES, AND OTHER ARTICLES ESSENTIAL** to the occupation of a building or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of its character and pass with a conveyance of the land. *Id.*
11. **FIXTURE, WHEN CONSTRUCTIVELY ANNEXED.**—A steam-engine which is used in a building in process of manufacture, and which can not be removed therefrom without tearing down a portion of the building to afford it egress, is constructively annexed thereto so as to become a fixture, though it is not fastened in any way. *Id.*
12. **LOOSE MOVABLE MACHINERY NOT AFFIXED TO THE BUILDING** in which it is situate and which may be removed without any damage to the building, is not a fixture though it is used in the prosecution of a business to which the building is devoted. *Id.*
13. **IRON-ROLLS AND THE PLATES CONSTITUTING THE FLOOR OF A ROLLING-MILL PASS BY A CONVEYANCE** of the mill, though not in reality attached to the freehold, nor is it material that the plates when originally constructed were not intended to be used as flooring, if afterwards put to that use. *Pyle v. Pennock*, 517.
14. **ARTICLES CONTAINED IN A MILL OR FACTORY, WHICH ARE INDISPENSABLE THERETO**, are part of the realty. *Id.*

FOREIGN JUDGMENTS.

See EVIDENCE, 15, 16; JUDGMENTS, 14.

FORMER RECOVERY.

See EVIDENCE, 5.

FORTHCOMING BOND.

See ATTACHMENTS, 9.

FRAUD.

1. **EVIDENCE—WHEN A PURCHASE IS CLAIMED TO HAVE BEEN FRAUDULENT**, evidence of distinct fraudulent purchases made at or about the same time as the purchase under consideration, is admissible. *Cary v. Hotelling*, 323.
 2. **SALE PROCURED BY THE FRAUDULENT MISREPRESENTATION** of the vendee in regard to his solvency, works no change of property, though the fraud be not indictable. *Id.*
 3. **TRESPASS, REPLEVIN, OR TROVER MAY BE SUSTAINED BY VENDOR** whose goods have been obtained from him by a fraudulent purchase. *Id.*
 4. **POSSESSION OF TRUE OWNER CAN NOT BE DIVESTED** by a tortious or fraudulent taking. *Id.*
- See ACCORD AND SATISFACTION, 2; BONDS, 10; COMMON CARRIERS, 3-5; DECEIT; EQUITY, 2, 3, 5, 7, 10; EXECUTIONS, 14; FRAUDULENT CONVEYANCES; NEGOTIABLE INSTRUMENTS, 3; VENDOR AND VENDEE, 5.

FRAUDULENT CONVEYANCES.

1. **RETENTION, BY VENDOR, OF POSSESSION OF GOODS, AFTER SALE**, is only presumptive evidence of fraud, which may be repelled by other testimony. *Briggs v. Parkman*, 89.

2. MORTGAGE OF TRADER'S STOCK OF GOODS IS NOT FRAUDULENT PER SE, although it provides that the mortgagor may retain possession, and make sales in the usual course of business, applying the proceeds thereof to his own use, where he, at the same time, promises, if he should make large sales, to replace the goods so sold, and where the property mortgaged is more than sufficient to pay the debt. The presumption of fraud arising from such a transaction may be repelled by satisfactory evidence. *Id.*
3. IT IS A SUFFICIENT CHANGE OF POSSESSION, that the depositary of the personality promises to keep the same thereafter for the vendee. *Potter v. Washburn*, 615.
4. SECRET TRUST INCONSISTENT WITH TERMS OF SALE OF PROPERTY, though evidence of fraud, if not satisfactorily accounted for, is not fraud *per se*, nor conclusive evidence of it. And there is no distinction, in this respect, between conveyances of real and of personal estate. *Oriental Bank v. Haskins*, 140.
5. CONVEYANCE FRAUDULENT AS AGAINST CREDITORS or against subsequent purchasers is voidable only, not absolutely void, and may be purged of the fraud by matter *ex post facto*, whereby the fraudulent intent is abandoned, and the conveyance confirmed for a good and adequate consideration *bona fide*. *Id.*

See EXECUTIONS, 14; HUSBAND AND WIFE, 8, 9.

GAMING.

BILLIARD TABLE USED FOR PLAYING GAME OF FARO ceases to be a billiard table in the eyes of the law, and does not fall within the exception of a statute prohibiting the keeping of any gaming table except billiard tables. *State v. Price*, 81.

GARNISHMENT.

See ATTACHMENTS, 1-6.

GENERAL AVERAGE.

See INSURANCE, 5.

GENERAL REPUTATION.

See MARRIAGE AND DIVORCE.

GUARANTY.

See SURETYSHIP, 6-10.

GUARDIAN AND WARD.

1. IN APPOINTMENT OF GUARDIAN AD LITEM for an infant defendant, where the father is complainant, the grandfather, being the next nearest relative of the infant, is entitled to be consulted. *Grant v. Van Schoonhoven*, 393.
2. PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM for an infant defendant by a master must show that the infant has been served with process of subpoena to appear, or that he has been proceeded against as an absentee and an order obtained for his appearance under the statute. *Id.*

See COSTS; DOMICILE; PROBATE COURTS, 11; TAXATION.

HABEAS CORPUS.

1. DISCHARGE ON HABEAS CORPUS can not be obtained on the ground that the prisoner is innocent of the offense for which he is held under an indictment. The question of his guilt or innocence must after indictment, be submitted to a jury. *People v. McLeod*, 323.
2. PRISONER MAY BE ADMITTED TO BAIL on *habeas corpus*, if charged with murder by a coroner's inquest, but not after the finding of an indictment of a grand jury, because in the former case the court may look into the depositions, and in the latter the evidence is secret. *Id.*
3. EXAMINATION INTO GUILT OR INNOCENCE of a prisoner must, on *habeas corpus*, even before indictment, be restricted to the proofs and depositions upon which he was committed. *Id.*
4. HABEAS CORPUS.—STATUTE REQUIRING THE COURT TO EXAMINE the facts contained in the return, and into the cause of confinement, and if no legal cause of confinement is shown, to discharge the prisoner; and further providing that he may deny the material facts stated in the return, or allege any fact showing that his imprisonment is unlawful, or that he is entitled to a discharge, does not entitle him to go behind the indictment in a summary manner, and to try before the court the issue regarding his guilt or innocence of the offense of which he is there accused. *Id.*
5. A STATE COURT MAY ON HABEAS CORPUS inquire into the validity of any detention of liberty which it is attempted to justify under pretense of authority derived from the United States. Thus it may pass upon the validity of an enlistment, and its sufficiency to justify the detention of a petitioner as a soldier. *State v. Dimick*, 197.
6. WHETHER OR NOT FACTS ALLEGED IN JUSTIFICATION OF HOMICIDE EXIST is the province of the jury to determine, and not a question to be decided on *habeas corpus*. *Id.*

HUSBAND AND WIFE.

1. A WIFE'S REVERSIONARY INTEREST IS NOT REDUCED TO THE HUSBAND'S POSSESSION by his purchase of the life-tenant's interest. He can not therefore sell the property so as to cut off his wife, in case she survives him. *Caplinger v. Sullivan*, 575.
2. AN AGREEMENT TO LIVE SEPARATE entered into by husband and wife will not be executed in chancery. *McKenna v. Phillips*, 438.
3. A WIFE MAY ACQUIRE A SEPARATE PROPERTY IN EQUITY, by an agreement with her husband, without the intervention of trustees; as where, on an agreement to live separate the parties separate, she relinquishes all right to his estate, and he pays her a sum of money and dies. *Id.*
4. A MARRIED WOMAN'S VERBAL DISPOSITION of her property to take effect upon her death is nugatory; and as to such property she dies intestate. *Id.*
5. BILL FILED BY HUSBAND IN THE NAME OF HIMSELF AND WIFE is considered his bill merely, and a decree in such suit is not binding on the wife in any future litigation. *Grant v. Van Schoonhoven*, 393.
6. WIFE IS ENTITLED TO RIGHTS OF SURETY FOR HUSBAND where she mortgages her separate estate or the reversionary interest in her realty to secure his debt, but not where she joins in a mortgage of his land for his debt. *Hawley v. Bradford*, 390.

7. **HUSBAND ACQUIRES NO INTEREST IN REAL ESTATE SET ASIDE TO HIS WIFE** under proceedings in partition by paying to the other tenants in common or coparceners the amounts due them from his wife. *Campbell v. Wallace*, 219.
8. **CONVEYANCE BY A FEMALE IS FRAUDULENT** if made prior to and upon the eve of her intended marriage, and after a treaty of marriage had been entered into. *Ramsay v. Joyce*, 550.
9. **SUCH A CONVEYANCE DERIVES NO VALIDITY** from the fact that its object was to make provision for the children of the grantor by a former marriage. *Id.*

See PARTITION, 2; PLEADING AND PRACTICE, 2.

INDEPENDENT COVENANTS.

See COVENANTS, 1, 7, 8.

INDICTMENT.

See CRIMINAL LAW, 1.

INDORSEMENTS.

See BANKS AND BANKING, 8, 9, 12-14, 19; PLEADING AND PRACTICE, 10; STATUTE OF LIMITATIONS, 9.

INFANCY.

1. **STATUTE PROVISION THAT AN INFANT SHALL NOT BE ENLISTED** without the consent of his parent or guardian is for the benefit of the infant; and if it is not complied with he may waive the irregularity and ratify the enlistment upon becoming of age. *State v. Dimick*, 197.
2. **DISSENT OF AN INFANT FROM A CONTRACT OF ENLISTMENT** must be expressed within a reasonable time after he comes of age, or it will be treated as ratified. The assent can not be postponed for more than a year in the absence of any special features. *Id.*
3. **INFANT MAY BE CONVICTED OF OBTAINING GOODS BY FALSE PRETENSES** where he purchases such goods on a credit by falsely representing himself to be a joint owner with his father of certain property. *People v. Kendall*, 240.

See DOMICILE, 1.

INJUNCTIONS.

INJUNCTION IS NOT A PROCESS WHICH IS EFFECTUAL to prevent the removal of personal property from the state. *Ramsay v. Joyce*, 550.

INSANITY.

See PRESCRIPTION, 1, 2.

INSTRUCTIONS.

See EXERCUTIONS, 17; NEW TRIAL, 3, 4; PLEADING AND PRACTICE, 19.

INSURANCE.

1. **WHERE POLICY REQUIRED INSURED TO STATE DISTANCE OF BUILDING** insured from the neighboring buildings, an omission to mention buildings

on another street, and from which there was no reasonable apprehension of danger, is not such a suppression of the truth as invalidates the policy, though the fire is communicated from them. *Dennison v. Thomaston Mut. Ins. Co.*, 42.

2. **EXPRESSION OF AN OPINION NOT A MISREPRESENTATION, WHEN.**—Where the insured, in answer to a question as to the locality of neighboring buildings, described certain sheds in conformity to the truth, but added that they “would not endanger the buildings if they should burn,” this addition is but matter of opinion, and would not amount to a misrepresentation, if honestly made. *Id.*
3. **INSURANCE AGAINST LOSS BY “THIEVES”** in a marine policy covers a loss by simple larceny as well as a loss by “assailing thieves.” *Am. Ins. Co. v. Bryan*, 278.
4. **INSURANCE AGAINST LOSS BY BARRATRY** of the master or mariners includes losses by larceny or embezzlement committed by the master or crew. *Id.*
5. **GOODS STOWED ON DECK AND LOST BY JETTISON** are not entitled to general average; and this rule applies to cases where goods are stowed on the decks of coasting vessels. *Doane v. Keating*, 671.
6. **INSURERS ARE NOT DISCHARGED** by the levy upon goods which are locked in the house wherein they are found by the sheriff. *Franklin Fire Ins. Co. v. Findlay*, 430.

INTERNATIONAL LAW.

1. **LAWFUL WAR**, by the law of nations, never exists without the concurrence of the war-making power. *People v. McLeod*, 328.
2. **WAR-MAKING POWER** of the United States is congress; of England, it is the queen. *Id.*
3. **A STATE OF PEACE AND THE CONTINUANCE OF TREATIES IS PRESUMED** by all courts of justice until the contrary is shown. *Id.*
4. **PRIVATE HOSTILITIES, HOWEVER JUST OR GENERAL**, do not constitute a legitimate and public state of war. *Id.*
5. **WAR MAY BE PUBLIC, PRIVATE, OR MIXED.** Private war is unknown in civil society, except so far as it may be exerted by way of defense between private persons. To public war, at least two nations are essential parties. Mixed war can be carried on only between a nation on one side and private individuals on the other. *Id.*
6. **RIGHT OF A NATION, OR ANY OF ITS CITIZENS, TO INVAD**e another nation and harm its property or citizens, does not exist until public war is lawfully denounced. *Id.*
7. **PUBLIC WAR IS OF TWO KINDS:** 1. By public declaration; 2. By war denounced without such declaration. The first is called solemn or perfect war, and extends to all the inhabitants of both nations. The second is styled unsolenn or imperfect war, because made by special declaration, and limited to particular objects, beyond which it does not authorize measures of hostility. *Id.*
8. **EMPLOYMENT OF SOLDIERS TO AID IN EXECUTING PROCESS** or in punishing or arresting individuals does not constitute a state of public war. *Id.*
9. **SOLDIERS OR OFFICIALS OF ONE NATION HAVE NO RIGHT TO ENTER THE TERRITORY OF ANOTHER** in pursuit of a criminal, nor for the purpose of attacking or capturing an enemy. *Id.*

10. JURISDICTION OF A NATION WITHIN ITS OWN TERRITORY is exclusive and absolute, and every hostile entry into neutral territory is necessarily unlawful. *Id.*
11. AN ENGLISH SUBJECT WHO UNDER THE DIRECTION OF THE LOCAL CANADIAN AUTHORITIES commits a homicide in the United States in time of peace, may be prosecuted here therefor, though his sovereign affirms his conduct and avows that the directions under which he acted were lawful acts of his government. *Id.*
12. SELF-DEFENSE, PLEA OF, not sustained where the party shows that he himself was the aggressor and made the attack, or that he acted in retaliation. *Id.*
13. IF A FOREIGNER ENGAGES IN PRIVATE WAR, he may be repelled when he comes with violence; but we have no right to assault him whilst the mischief is in machination only, or to revenge ourselves upon him after he has committed it. *Id.*
14. PERSONS ACTING IN THE TERRITORY OF ANOTHER NATION, in time of peace, though upon the command of their government, and being then beyond the jurisdiction of the government for which they act, must be treated as proceeding on their own responsibility, and may be prosecuted as criminals in the courts of the nation thus entered, though their own government adopts and approves their crime. *Id.*
15. LAWS OF A NATION can not extend beyond its own territory. *Id.*
16. SOLDIER IS NOT BOUND TO OBEY HIS SOVEREIGN, by going into a neighboring nation, during time of peace, and there committing an unlawful act. *Id.*
17. SPIES AND OTHER PERSONS UNDERTAKING THE COMMISSION OF CRIMES not authorized by public war, are not protected by the command of their superior from punishment in the tribunals of the nation whose laws are violated. *Id.*
18. APPROVAL OF HIS SOVEREIGN DETRACTS NOTHING from the criminality of the subject who has committed a crime in a foreign country during time of peace. The case of ambassadors forms an exception to this rule. *Id.*
19. DIPLOMACY IS NOT AN EXECUTIVE BUT A JUDICIAL FUNCTION; and the joint diplomacy of two nations can not oust the courts of one of them from trying a person accused of committing a crime. *Id.*

JETTISON.

See INSURANCE, 5.

JUDGMENTS.

1. ACCEPTING CONFESSION OF JUDGMENT BY SURVIVOR IN JOINT ACTION against two obligors, where one has died pending the action, discharges the latter's estate. *Finney v. Cochran*, 450.
2. JUDGMENT DEBTOR IS ESTOPPED BY JUDGMENT CONFESSED voluntarily to an administrator for the amount of a note signed by such debtor, found among the intestate's papers, without intimating that he has any defense thereto, and can not question the validity of such judgment by showing that the note was founded upon an illegal consideration, unless he can show some mistake. *Shufelt v. Shufelt*, 381.
3. SUBSEQUENT MORTGAGEE CAN NOT QUESTION VALIDITY OF JUDGMENT confessed by the mortgagor, which constitutes a lien upon the mortgaged

- premises, on the ground of the illegality of the consideration of the indebtedness upon which such judgment is founded, where the mortgagor himself could not file a bill to set aside the judgment. *Id.*
4. JUDGMENT IN FAVOR OF ONE IN AN ACTION BY TWO is irregular. *Allen v. Bradford*, 689.
 5. AMENDMENT, NUNC PRO TUNC, OF JUDGMENT upon which no execution has issued within a year and a day, is proper, but *scire facias* will still be necessary to entitle the plaintiff to execution. *Id.*
 6. ENTRY OF JUDGMENT NUNC PRO TUNC WITHOUT NOTICE is good. *Id.*
 7. SUFFICIENT WARRANT FOR JUDGMENT NUNC PRO TUNC may be furnished by the declaration showing in whose favor judgment should be entered. *Id.*
 8. RECITAL IN ENTRY OF JUDGMENT NUNC PRO TUNC that the mistake in the first entry was "satisfactorily shown," warrants the presumption that there was legal proof of that fact. *Id.*
 9. JUDGMENT IN EJECTMENT BROUGHT BY A WARRANTER is evidence against the personal representatives of the warrantor to whom notice of the pendency of the action had been given, although no further notice is given to the personal representative, the warrantor dying pending the action. *Brown v. Taylor*, 618.
 10. JUDGMENT IN EJECTMENT AGAINST A WARRANTER is conclusive against the warrantor with notice, and of want of title in him, in an action on the covenant of warranty. *Id.*
 11. JUDGMENT IN SUCH CASE is evidence of want of title in the warrantor, only to the tract involved in such action. *Id.*
 12. THE LIEN OF A JUDGMENT IS NOT LOST by the division of the county, so that land affected by the lien falls without the old county, in the absence of legislation taking away the lien. *Davidson v. Root*, 411.
 13. JUDGMENT IN EJECTMENT IS CONCLUSIVE OF TITLE upon the parties and those claiming under them. *Parks v. Moore*, 589.
 14. INVOLUNTARY TRANSFER OF PROPERTY BY VIRTUE OF PROCESS OF A FOREIGN COURT having jurisdiction of the parties and the subject-matter of the action, will not be disturbed by the courts of another state within whose jurisdiction the property may be removed *pendente lite*. *Lowry v. Hall*, 495.
 15. DEBT UPON A DECREE IN CHANCERY for the balance of account between partners, will lie. *Thrall v. Waller*, 592.
- See ACTIONS, 4; EQUITY, 1; EVIDENCE, 15, 16; EXECUTIONS, 1, 3; MORTGAGES, 8; NEGOTIABLE INSTRUMENTS, 9; PARTNERSHIP, 5; PLEADING AND PRACTICE, 19; STATUTE OF FRAUDS, 6.

JUDICIAL KNOWLEDGE.

See EVIDENCE, 1.

JUDICIAL SALES.

STATUTORY AUTHORITY by which a man may be deprived of his estate must be strictly pursued. *Bloom v. Burdick*, 299.

JURISDICTION.

See INTERNATIONAL LAW, 10, 11, 14, 15, 19; PROBATE COURTS.

JURY AND JURORS.

1. **PARTY IS INCOMPETENT TO SIT AS JUROR** who has formed and expressed a decided opinion as to the guilt or innocence of the prisoner. *Armistead v. Commonwealth*, 633.
2. **WHERE PARTY FORMED AND EXPRESSED A DECIDED OPINION** as to the prisoner's guilt, from a conversation with the prosecuting witness, he is incompetent to sit as a juror. *Id.*

See **HABEAS CORPUS**, 6; **LIBEL**, 3; **NEW TRIAL**, 2, 3; **PROBATE COURTS**, 6.

JUSTICES OF THE PEACE.

JUSTICE OF THE PEACE MAY BY PAROL AUTHORIZE ANOTHER TO ISSUE EXECUTION in his name, the issuance of execution being merely a ministerial act. *Kyle v. Evans*, 705.

See **CRIMINAL LAW**, 6, 9.

LANDLORD AND TENANT.

1. **LETTING ON THE SHARES FOR A SINGLE CROP** makes the parties tenants in common thereof. *Putnam v. Wise*, 309.
2. **PRIVILEGE OF PERSONS OCCUPYING LAND ON THE SHARES** to have a renewal of their contract for a second year, does not change their contract into one of leasing, so as to deprive the owners of their interest as part owners or co-tenants of the crops raised. *Id.*
3. **COVENANT TO PAY A FIXED QUANTITY OF WHEAT** or other products of a farm for the use thereof, does not give the lessor any present interest in such product. *Id.*
4. **CONTRACT TO RENDER A MOIETY OF THE PRODUCTS OF A FARM** for the use thereof, though containing apt words to make a lease, will not be construed as a leasing with a reservation of rent, but as a letting on the shares, which results in both owner and occupier having a present interest as tenants in common of the crop. *Id.*
5. **IF LAND IS OCCUPIED ON THE SHARES**, and the occupiers covenant to yield and pay to the owners one half of all the grain raised on the farm, to be delivered at a place designated, and one of the occupiers afterwards enters into an agreement with other persons to do certain work and to receive therefor one third of such occupier's share, all the parties are, until the grain is delivered and divided, tenants in common thereof, and not partners. *Id.*
6. **TENANT IS ENTITLED TO REMOVE WAY-GOING CROP, INCLUDING THE STRAW** as well as the grain, on quitting the premises at the expiration of his term. *Craig v. Dale*, 477.
7. **UNDER LEASE OF FARM WITH THE COWS AND SHEEP** thereon for a term of years at an annual rent, with the following stipulation: "Cows of equal age and quality to be returned at the end of the said term, and also the sheep;" the property in the cows and sheep on the farm during the term, whether they be the same as those originally received, or others purchased by the tenant in lieu of those which have been sold, is in the tenant, and the same may be seized and sold by his creditors, and the lessor can not restrain such seizure and sale, without a provision in the lease reserving to him a lien on the stock on the farm. *Carpenter v. Griffin*, 396.

8. RENT DUE AND IN ARREAR AT TIME OF EXECUTION OF MORTGAGE of the premises, out of which it accrued, does not pass by the conveyance of the land, but is a mere chose in action, which the grantee can not maintain an action in his own name to recover, although his grantor has assigned it to him. *Burden v. Thayer*, 117.
9. LANDLORD MAY FORCIBLY DISPOSSESS TENANT AFTER EXPIRATION of his lease, immediately on his declining to quit possession on request, the tenant being then merely tenant at will, and if there be no unnecessary force or wanton damage the landlord is not liable for injury thereby caused to the tenant's goods. *Overdeer v. Lewis*, 440.
10. AGREEMENT FOR LEASE NOT ACKNOWLEDGED AND RECORDED agreeably to the registration laws of the state passes no title whatever in the demised premises to the lessee. *Anderson v. Critcher*, 72.
11. COVENANT TO PAY RENT IS INOPERATIVE AND VOID in such an instrument, and no action can be maintained thereon. *Id.*
12. REMEDY OF OWNER WHERE LESSEE OCCUPIES UNDER VOID AGREEMENT is by an action of trespass *q. c. f.* if the occupation is without his consent, or by an action for use and occupation or assumpsit if the lessee occupies with his consent. *Id.*

See CHAMPERTY; MORTGAGES, 2, 3; STATUTE OF LIMITATIONS, 3.

LARCENY.

See CRIMINAL LAW, 2, 3.

LEGACIES.

See WILLS, 6, 9-11, 12.

LEX FORI.

See CONFLICT OF LAWS, 3.

LIBEL.

1. IN ACTION OF LIBEL TWO ARTICLES CAN NOT BE COUPLED to ascertain if one of them is libelous or not, the articles not being published in the same paper. *Usher v. Severance*, 33.
2. ALLEGATIONS OF PLAINTIFF BEING PROVED, LAW IMPLIES MALICE in the defendant, and the burden of disproving it is thrown on him. *Id.*
3. JURY DETERMINES WHETHER LANGUAGE IS LIBELOUS or not. *Id.*
4. WRITTEN WORDS MAY BE LIBELOUS AND ACTIONABLE, though they would not have been slanderous had they been spoken. *Obaugh v. Finn*, 773.
5. WORDS WRITTEN AND PUBLISHED ARE LIBELOUS whenever they tend to cast contumely upon a party, or to prejudice him in his employment; and proof of the publication of such words will alone sustain an action, without the necessity of the proof of special damages. *Id.*
6. UPON A DEMURRER TO EVIDENCE, FINAL JUDGMENT must be entered for the plaintiff or defendant, accordingly as the demurrer is overruled or sustained. *Id.*
7. UPON A DEMURRER TO THE EVIDENCE BEING INTERPOSED, the jury should be discharged either at once or after a conditional verdict has been taken for plaintiff. It will be error to retain the jury, and to submit to them, after the demurrer has been overruled, the assessment of damages. *Id.*

LICENSE.

See EXECUTORS AND ADMINISTRATORS, 2; FERRIES, 1.

LIENS.

1. ARTISAN WHO HAS BESTOWED HIS LABOR UPON PROPERTY HELD BY HIM AS BAILEE has a lien thereon, at common law, for the value of his services. *McIntyre v. Carver*, 519.
2. LIEN FOR SERVICES CAN NOT EXIST in favor of one not having a right of possession. *Id.*
3. JOURNEYMAN OR DAY LABORER IS NOT ENTITLED to a lien on property for his services thereupon. *Id.*
4. PERSON EMPLOYED TO MAKE THE DOORS FOR A HOUSE by the carpenter engaged by the owner to do the carpenter work thereon, the lumber for the doors being delivered by the owner to the carpenter, and by the latter to the person so employed, the work being done at the latter's shop, has a lien upon the doors, when finished, for the value of his labor. *Id.*
5. WHERE DEED IS NOT TO BE EXECUTED TILL PAYMENT is made in a contract for the sale of real and personal estate, the vendor has a lien on all the property for the purchase price. STANARD, J., dissented as to the lien on the personalty. *Clarke v. Curtis*, 625.
6. VENDOR MAY FOLLOW PERSONALTY INTO HANDS OF THIRD PERSONS to whom vendee has sold it *pendente lite* in such a case. *Id.*
7. FINDER OF LOST PROPERTY HAS A LIEN THEREON for the amount of the reward offered by the loser for its restoration, and he may retain possession thereof until the reward is paid. *Wentworth v. Day*, 145.

See JUDGMENTS, 12.

MALICE.

See LIBEL, 2.

MARRIAGE AND DIVORCE.

MARRIAGE MAY BE PROVED BY GENERAL REPUTATION and cohabitation, except in a prosecution for bigamy or an action for criminal conversation, and even then it may be proved by witnesses who were present at the marriage. *Arthur v. Broadnax*, 707.

MARRIED WOMEN.

MARRIED WOMAN TRADING AS FEME SOLE AFTER DESERTION by her husband, who has abjured the state, may sue alone on a note given to her in that character. *Arthur v. Broadnax*, 707.

MASTER AND SERVANT.

1. AN EMPLOYEE DISCHARGED BEFORE THE COMPLETION OF THE TIME OF SERVICE for which he has been engaged, for fault or misconduct upon his part, of sufficient aggravation to justify the discharge, is not entitled to any compensation for the services actually performed. *Posey v. Garth*, 183.
2. SERVANT DISCHARGED FOR MISCONDUCT can not recover his wages. *Libhart v. Wood*, 461.

2. **SERVANT ON PACKET-BOAT FORFEITS WAGES BY STEALING GOODS** of a passenger on the boat during his term of service. *Id.*

MISREPRESENTATIONS.

See **FRAUD**, 2; **INSURANCE**, 2.

MISTAKE.

See **ARBITRATION AND AWARD**, 3; **AUCTIONS**, 4; **CORPORATIONS**, 12; **EQUITY**, 2, 8, 9; **SHERIFFS**.

MORAL OBLIGATIONS.

See **ACCORD AND SATISFACTION**, 3; **BANKRUPTCY AND INSOLVENCY**, 2.

MORTGAGES.

1. **A MORTGAGE OF PERSONAL PROPERTY** need not be by sealed instrument. *Despatch Line v. Bellamy Mfg. Co.*, 203.
2. **WHERE OWNER OF LAND LEASED FOR TERM OF YEARS MORTGAGES THE SAME**, the mortgage transfers to the mortgagee the reversion, to which the rent is incident, and if he gives notice to the lessee of his right thereto, the latter will thereafter be liable to pay to him all rents that become due after the date of such conveyance and notice. But the mortgagee can not recover from the lessee rent which became due prior to the execution of the mortgage. *Burden v. Thayer*, 117.
3. **ATTORNEYMENT IS NO LONGER NECESSARY TO ENABLE PURCHASER OF REVERSION** to maintain against the lessee an action of debt for rent. *Id.*
4. **BONA FIDE MORTGAGEE OF FRAUDULENT GRANTEE** of premises conveyed in fraud of creditors, having no notice of the fraud, is entitled to a preference over a creditor of the fraudulent grantor who obtains judgment and buys in the premises on execution after the fraudulent conveyance, but before the mortgage, but whose deed is not recorded until after the mortgage is recorded, although part of the amount loaned on the mortgage is not paid over to the mortgagor until after the sheriff's deed is recorded. *Ledyard v. Butler*, 379.
5. **PRIORITY BETWEEN PURCHASERS FROM FRAUDULENT GRANTOR and fraudulent grantee**, respectively, is with him who first records his deed. *Id.*
6. **MORTGAGEE IS PURCHASER** to the extent of his interest within the meaning of the statute of frauds. *Id.*
7. **MORTGAGE DEBT IN THE HANDS OF AN ASSIGNEE OF THE MORTGAGE** is not affected by payments of money made by the mortgagor for the benefit of the mortgagee, previous to the assignment, with a general understanding that such payments were to be credited on the mortgage debt, unless by indorsement or other mode or memorandum of credits such proportion of the debt was in fact relinquished by an actual application of the sums so paid to its discharge. *Post v. Carmalt*, 484.
8. **MORTGAGEE HAVING RECOVERED JUDGMENT FOR PART** of the mortgage debt at law can not have a decree of foreclosure, where that fact appears by his bill, until execution on such judgment has been returned unsatisfied, even though the bill is taken *pro confesso*. *Shufelt v. Shufelt*, 381.

2. DEED OF TRUST FOR PROPERTY JOINTLY PURCHASED will be continued for the benefit of one party, so far as he has made payments beyond his just proportion of the debt. *Wheatley v. Calhoun*, 654.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3; DOWER, 1-3; ESTOPPEL, 1; FRAUDULENT CONVEYANCES, 2; JUDGMENTS, 3; LANDLORD AND TENANT, 8.

MULTIFARIOUSNESS.

See EQUITY, 11-13.

MURDER.

See CRIMINAL LAW, 4, 5.

NAVIGABLE WATERS.

See WATERCOURSES, 2, 3.

NEGLIGENCE.

See ATTORNEY AND CLIENT, 4, 5, 7; STATUTE OF LIMITATIONS, 7.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTES ARE NOT PRESUMED TO BE MADE ON TIME. *Wyman v. Rae*, 70.
2. CREDITOR'S DISCOUNTING DRAFT SENT HIM BY DEBTOR and giving the latter credit before the draft is honored, will not conclude him in the absence of negligence or want of fidelity; and having taken up the draft after its dishonor, he is entitled to recover that amount from the debtor. *Goodnow v. Howe*, 46.
3. PROMISSORY NOTE GIVEN IN CONSIDERATION THAT A PARTY WILL WITHDRAW BID made on a sale of public lands is fraudulent and void. *Blythe v. Lovinggood*, 402.
4. NOTE PAYABLE "TO THE ORDER OF THE INDORSER'S NAME," is negotiable. *United States v. White*, 374.
5. NOTE HELD AS COLLATERAL SECURITY FOR A PRECEDENT DEBT is subject to the same defenses as if in the hands of the original payee. *Oullum v. Branch Bank*, 725..
6. HOLDER OF A BILL OF EXCHANGE WHO HAS RECEIVED OF THE DRAWER A NEW BILL for a part of the amount and has given time to the drawer to pay the balance, does not thereby release the acceptor, though the latter accepted the bill merely for the accommodation of the drawer, of which fact the holder was informed. *White v. Hopkins*, 542.
7. FORMAL RELEASE OF DRAWER BY THE HOLDER OF A BILL OF EXCHANGE is no release of the acceptor, unless such discharge of the holder was made in consideration of payment or other satisfaction by which the bill was, to all intents and purposes, paid. *Id.*
8. HOLDER CAN NOT BE ENJOINED FROM PROCEEDING AGAINST ACCOMMODATION INDORSER of a bill until he has exhausted his remedies against the acceptor, nor can the acceptor require him to collect the amount in equal portions from himself and the indorser, on the ground that they are both accommodation parties and co-sureties for the drawer. *Abercrombie v. Knox*, 721.

9. ACCOMMODATION INDORSER CAN NOT HAVE BENEFIT OF JUDGMENT recovered by the holder against the drawer of a bill until he has paid the debt. *Id.*
 10. BONA FIDE HOLDER OF PROMISSORY NOTE IN WHICH A BANK IS NOMINAL PAYEE may sue thereupon in the name of the bank upon giving it proper security against costs. *Elliot v. Abbot*, 227.
 11. A NOTE PAYABLE TO ONE PERSON, BUT DELIVERED TO ANOTHER, as the promise of the maker to him, may be declared upon by the latter in his own name as a note made payable to himself by the name of the third person. *Id.*
 12. A NOMINAL PAYEE MAY MAKE A VALID INDORSEMENT of a promissory note to the real payee, in order to facilitate an action by the latter. *Id.*
 13. REQUEST BY ACCOMMODATION INDORSERS upon the holder of a protested note, that he immediately proceed to sue the maker, accompanied with the information that upon a failure so to do they will hold themselves discharged, imposes no duty upon the holder; nor will the indorsers be discharged because the maker of the note, subsequently to the request which has not been complied with, becomes insolvent. *Bullit v. Thatcher*, 175.
 14. ORIGINAL PROMISOR, WHEN INDORSER IS CONSIDERED AN.—Where the payee of a promissory note has taken it and carried it away, but, on the same or the next day, returns it to the maker with a request to have him procure an indorser thereon, which the maker does, the indorser so obtained will be considered an original promisor, and as such jointly and severally liable with the maker. *Samson v. Thornton*, 135.
 15. WHERE PARTY IS NOT BOUND TO PRODUCE PROMISSORY NOTE, evidence offered with a view to account for its non-production is unnecessary and inadmissible. *Wymān v. Rae*, 70.
 16. WHERE NOTE HAS BEEN GIVEN, ITS PRODUCTION IS GENERALLY REQUIRED in an action on the original cause, for the security of the defendant, and not from any rule of evidence which would prevent the introduction of evidence of indebtedness without the production of the note. *Id.*
 17. EVIDENCE OF INDEBTEDNESS WITHOUT PRODUCTION OF NOTE is admissible in such a case. *Id.*
 18. PARTIES TO BILL ARE ALL ABSOLUTELY LIABLE AFTER DEFAULT by the acceptor and notice thereof, and the holder may proceed against one or all, at his election, until he obtains satisfaction. *Abercrombie v. Knox*, 721.
 19. PROOF THAT MAKER OF NOTE HAS ABSCONDED before the day of payment dispenses with the necessity of showing demand against him, or an attempt at demand, in order to charge the indorser; otherwise where the maker has merely changed his residence. *Lehman v. Jones*, 455.
- See ACTIONS, 4; AGENCY, 5; ATTORNEY AND CLIENT, 5, 6; BANKS AND BANKING; CONSTITUTIONAL LAW, 5; EQUITY, 9; EVIDENCE, 2, 4; EXECUTIONS, 10; EXECUTORS AND ADMINISTRATORS, 3; PARTNERSHIP, 1, 4; PAYMENT, 1, 3; PLEADING AND PRACTICE, 10; STATUTE OF FRAUDS, 7; SURETYSHIP, 7, 8; USAGE, 1, 2.

NEW TRIAL.

1. REJECTING WITNESS IS NOT GROUND FOR A NEW TRIAL, where, by reason of the abandonment of the claim to which the witness would testify, no damage has resulted to the defendant. *Potter v. Washburn*, 615.

2. **NEW TRIAL WILL NOT BE GRANTED ON JURORS' AFFIDAVITS** that the verdict was assented to in consequence of errors made during their deliberations and subsequently discovered. *Newton v. Booth*, 596.
3. **MISDIRECTION OF THE JURY UPON AN ABSTRACT MATTER** which is rendered wholly immaterial by a correct instruction upon another matter decisive of the cause, constitutes no ground upon which to reverse a judgment in favor of the party in whose behalf the instructions were given. *Chambers v. Bedell*, 508.
4. **CHARGE WHICH TENDS TO MISLEAD THE JURY** by inducing them to believe there is but one point of defense, when in truth there are two, and the evidence introduced under the defense upon which no instruction is given is involved in the greater uncertainty, is a sufficient ground for remanding the cause for another trial. *Relf v. Rapp*, 528.

See **BOUNDARIES**, 3; **PLEADING AND PRACTICE**, 19.

NOLLE PROSEQUI.

See **PLEADING AND PRACTICE**, 23, 24.

NONSUIT.

See **ATTORNEY AND CLIENT**, 3, 4.

NOTICE.

See **SURETYSHIP**, 6, 10.

NUNC PRO TUNC.

See **JUDGMENTS**, 5-8.

NUNCUPATIVE WILLS.

See **WILLS**, 1-3.

OFFICES AND OFFICERS.

1. **SALE OF OFFICE.**—Appointment of a deputy sheriff under an agreement that he shall pay to his principal one half of the fees received by such deputy for his services is not the selling of an office. *Mott v. Robbins*, 286.
2. **BOND OF DEPUTY SHERIFF** conditioned that he will indemnify the principal from all damages arising from the deputy's conduct and pay to the sheriff one half of all fees received, is valid. *Id.*
3. **OFFICER MAY TAKE AN AGREEMENT** for the payment to him of part of the fees of his office, because he is in law entitled to the whole thereof; and he may divide his fees with a deputy as a mode of paying the latter for services. *Id.*
4. **AGREEMENT BY A DEPUTY TO PAY THE PRINCIPAL A SPECIFIED SUM**, not arising out of the profits of the office, is void, as amounting to the sale of an office. *Id.*

See **SHERIFFS**.

ORPHANS' COURT.

See **PROBATE COURT**.

OUSTER.

See **CO-TENANCY**, 3, 4; **DISSEISIN**, 2, 3.

PARENT AND CHILD.

See DOMICILE, 1; STATUTE OF FRAUDS, 1.

PAROL EVIDENCE.

See EVIDENCE, 3, 4, 5, 7.

PARTITION.

1. PAROL PARTITION CARRIED INTO EFFECT BY POSSESSION in accordance therewith, is binding between tenants in common whose titles are distinct. *Ryers v. Wheeler*, 243.
2. PAROL PARTITION BY GRANTEE OF HUSBAND WHO IS TENANT BY CURTESY, the wife not having acknowledged the deed so as to pass her interest, though not binding on the wife, is good in ejectment against a stranger. *Id.*
3. WHERE A PARTITION OF REAL ESTATE BY A PROBATE COURT has been acquiesced in by the heirs for twenty years, the proceedings of the court will be presumed to have been regular, and be held conclusive. *Campbell v. Wallace*, 219.
See HUSBAND AND WIFE, 7.

PARTNERSHIP.

1. AN ACCEPTANCE BY ONE MEMBER OF A FIRM OF A BILL OF EXCHANGE, which represents a private debt of his own, binds the firm, if the holder of the bill was ignorant of the nature of its consideration. *Potter v. Dillon*, 185.
2. REALTY PURCHASED BY TWO JOINTLY IS NOT PARTNERSHIP PROPERTY, though they are to carry on the business of milling therewith. *Wheatley v. Calhoun*, 654.
3. PURCHASE BEING ON INDIVIDUAL RESPONSIBILITY IN SUCH A CASE, the payment of one of the installments out of the partnership funds does not convert the realty into partnership property. *Id.*
4. AFTER DISSOLUTION OF FIRM, PARTNER CAN NOT GIVE NOTE in firm name for past indebtedness without some special authority. *Woodworth v. Downer*, 611.
5. CONFESSION OF JUDGMENT BY ONE PARTNER BINDS HIM, but not his co-partner. *Bitzer v. Shunk*, 469.
6. IN EQUITY A PARTNERSHIP DEBT IS CONSIDERED JOINT AND SEVERAL, and upon the death of any member of the firm the creditor may proceed directly against the estate of the deceased partner. This rule has been adopted by our statute, and in consequence in Arkansas a partnership creditor is entitled to an allowance in the probate court of a partnership debt which he has presented to the representative of a deceased partner. *McLain v. Carson*, 777.
7. AT COMMON LAW A PARTNERSHIP DEBT IS THE JOINT DEBT of the partners, and the death of any member of the firm extinguishes the debt as to him; and the remedy of the creditor is confined to one against the survivors. *Id.*
See ATTACHMENTS, 6; LIENS, 8.

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 2, 3; STATUTE OF FRAUDS, 5.

PAYMENT.

1. ORIGINAL DEBT IS DISCHARGED if the debtor effects a compromise, and gives the note of a third person in payment of the sum fixed by the compromise. *Stafford v. Bacon*, 366.
2. BONA FIDE PAYMENT IN NOTES OF BANK WHICH HAS FAILED, neither party having knowledge of the failure, is good and discharges the debt. *Bayard v. Shunk*, 441.
3. TAKING NOTE FOR GOODS SOLD AND DELIVERED does not extinguish the original cause of action. *Wyman v. Rae*, 70.
4. WHERE NEITHER DEBTOR NOR CREDITOR MAKES APPLICATION OF PAYMENTS, the law will make the application according to the justice of the particular case, in view of all the attendant circumstances. *Smith v. Loyd*, 621.
5. RULE GOVERNING APPLICATION OF PAYMENTS BY AN ATTORNEY to a client is not the same as that which governs payments by a debtor to a creditor. *Id.*
6. APPLICATION SHOULD BE TO EXTINGUISH DEBTS ACCORDING TO PRIORITY of time, in cases of long-standing accounts where debts and credits are constantly occurring and no balances are struck otherwise than for the purpose of making rests. *Id.*

See ACCORD AND SATISFACTION, 1; MORTGAGES, 7; PROBATE COURTS, 7.

PLEADING AND PRACTICE.

1. PARTIES HAVING CONFLICTING INTERESTS CAN NOT BE JOINED as complainants in a suit. *Grant v. Van Schoonhoven*, 393.
2. TRUSTEES OF VOLUNTARY ASSOCIATION ARE LIABLE ON NOTE given by them for labor done for the association; and the non-joinder of the other members of the association should be taken advantage of by abatement. *Chick v. Trevett*, 68.
3. WIFE SHOULD BE MADE DEFENDANT IN SUIT BROUGHT BY HUSBAND to set aside a conveyance of property to trustees for her separate use for life, with remainder to her children; and if she is joined as complainant in a suit brought against the trustees and the infant children, the latter should be permitted by their guardian *ad litem* to put in a special answer for the purpose of raising the objection and compelling the complainant to amend by making the wife defendant. *Grant v. Van Schoonhoven*, 393.
4. OPERATION OF THE RULE THAT A PERSON CAN NOT BE PARTY PLAINTIFF and also defendant is confined to natural persons. *Connell v. Woodard*, 173.
5. TRUSTEES OF SCHOOLS CONSTITUTE QUASI CORPORATIONS, and may, in their corporate character, sue their own members. It will not affect the rule that the action is brought in the names of the individual trustees, instead of under the general title of trustees of schools. *Id.*
6. INFORMALITIES IN MAKING EXECUTORS OF DECEASED DEFENDANT PARTIES are deemed waived, where, on suggestion of the death of the defendant, *scire facias* is directed to issue to his representatives, not naming them or stating whether they are executors or administrators, but they are correctly described in the *scire facias* which is duly served on them, and where, although they are not formally made parties, the judgment entry designates them as executors and recites that they appeared and went to trial. *Kennedy v. Geddes*, 714.

7. **NON-JOINDER OF A PARTY TO A REAL ACTION** must be pleaded in abatement or the objection is lost. *Campbell v. Wallace*, 219.
8. **OBJECTION TO THE MISJOINDER OF THE PARTIES TO A REAL ACTION**, if the misjoinder do not appear from the record, must, if not pleaded in abatement, be taken advantage of by a motion for a nonsuit; it will be too late to urge the objection after a verdict. *Id.*
9. **OBJECTION THAT PARTY WAS IMPROPERLY JOINED IN BILL** for specific execution of a contract of sale, and that the bill ought to be dismissed as to him, is premature where there was not a final decree in the cause. *Clarke v. Curtis*, 625.
10. **AN INDORSER FOR COLLECTION** may recover from the maker of a negotiable note, on the common counts. *Chase v. Burham*, 602.
11. **IF A COUNT IS BAD IN SUBSTANCE**, the defendant must prevail though his plea thereto is bad and is demurred to. *United States v. White*, 374.
12. **IF ANY ONE COUNT IN A DECLARATION IS GOOD**, a demurrer to the whole declaration must be overruled though the other counts are bad in substance. *Id.*
13. **DEFENDANT BY PLEADING TO ACTION ADMITS FILING OF DECLARATION** therein. *Arthur v. Broadnax*, 707.
14. **WHERE AGREEMENT DECLARED ON IS NOT AGREEMENT GIVEN ON OYER** according to its true intent or meaning, a demurrer to the declaration should be sustained. *Anderson v. Critcher*, 72.
15. **DECLARATION IS AMENDABLE AFTER VERDICT** for the plaintiff in ejectment, to conform to the nature of his title, where he claims title to the whole of the premises, but his title as to an undivided part is subject to be defeated by a future claim of a *feme-covert*. *Ryers v. Wheeler*, 243.
16. **UNDER AN ACT ALLOWING AN AMENDMENT "ON" THE TRIAL**, plaintiff may amend his declaration during the argument. *Franklin Fire Ins. Co. v. Findlay*, 430.
17. **DEMANDANT IN WRIT OF RIGHT MAY RECOVER UNDER TITLE BY DISEISEIN**, unless the tenant can show a better title. *Hunt v. Hunt*, 130.
18. **DARREIN SEISEIN IS A GOOD PLEA** in a writ of right. *Id.*
19. **ERRONEOUS ABSTRACT INSTRUCTION** is not a ground for reversing a judgment. *Arthur v. Broadnax*, 707.
20. **RELEASE OF ERRORS IN A JUDGMENT IS PLEADABLE IN BAR** of the assignment of errors in the appellate court. *Barnes v. Moody*, 172.
21. **FORBEARANCE FROM THE ENFORCEMENT OF A LEGAL RIGHT** is a sufficient consideration to support a release of errors. *Id.*
22. **JURAT TO ANSWER IN FORM OF CERTIFICATE** by the officer, that the defendant swore that the "facts," instead of the "matters," stated in the answer "were true," instead of "are true," is sufficient. *Whelpley v. Van Epps*, 400.
23. **POWER TO ENTER A NOLLE PROSEQUI** was, at common law, confided to the attorney-general alone. Under our statutes it is delegated to the district attorneys, to be exercised with leave of the court. *People v. McLeod*, 328.
24. **COURT CAN NOT ORDER THE ENTRY OF A NOLLE PROSEQUI** on affidavits and other proofs submitted by the prisoner, the district attorney having made no application for leave to make such entry. *Id.*
25. **PENDENCY OF A PRIOR SUIT IN A FOREIGN COUNTRY** can not be pleaded in abatement of an action for the same cause in this state as to actions

which are strictly personal in their nature, but the pendency of a proceeding *in rem* in a foreign jurisdiction may be so pleaded, as also may a proceeding in a mixed action, in which a specific thing as well as the performance of a personal obligation is demanded. *Lowry v. Hall*, 495.

26. RECORD OF AN EARLIER AND PENDING ACTION OF REPLEVIN BROUGHT IN A FOREIGN STATE while the goods were within its jurisdiction, and in which possession was delivered to the plaintiff, may be given in evidence to support a plea in bar of a similar action brought by the former owner of the property to regain possession of it after its removal to this state. *Id.*

27. A GENERAL DEMURRER TO A DECLARATION WHICH CONTAINS SEVERAL COUNTS is bad at common law, if any one of the counts is good. *Lane v. Levillian*, 769.

See ARBITRATION AND AWARD, 4-6; ATTACHMENTS, 3, 4, 6; ATTORNEY AND CLIENT, 3, 4, 10; BANKRUPTCY AND INSOLVENCY, 1; BONDS, 4, 9, 10, 11; CONSTITUTIONAL LAW, 5; CONTRACTS, 5-7; CORPORATIONS, 13; EQUITY, 11-13; EXECUTIONS, 10, 17; GUARDIAN AND WARD, 2; HABEAS CORPUS, 3; JUDGMENTS, 4-7; LIBEL, 6-7; MARRIED WOMEN, 1; NEGOTIABLE INSTRUMENTS, 11, 15-17; NEW TRIAL; PROBATE COURTS; REPLEVIN; SET-OFF, 3; USURY, 4.

POSSESSION.

See LIENS, 2, 7; SPECIFIC PERFORMANCE, 3.

PRESCRIPTION.

1. WHERE SON, ON HIS FATHER'S BECOMING INSANE, TAKES MANAGEMENT of his farm, with the consent of the mother and the rest of the family, he is considered as occupying under his father, and the profits taken by him during his father's life-time are considered as taken for the latter's use and benefit. And in such a case the seisin of the father will be considered as continuing up to the time of his death. *Hunt v. Hunt*, 130.

2. WHERE A FATHER BECAME INSANE AND ONE OF HIS SONS TOOK THE MANAGEMENT of his farm during the rest of his father's life-time, and remained in possession of it for thirty years afterwards, these facts do not warrant a presumption of a conveyance to him by the father, or of a release to him by the other heirs, subsequent to their father's death. *Id.*

PRESUMPTIONS.

See ATTORNEY AND CLIENT, 6; CORPORATIONS, 3; CO-TENANCY, 3; EXECUTIONS, 9; FRAUDULENT CONVEYANCES, 2; JUDGMENTS, 9; NEGOTIABLE INSTRUMENTS, 1; PARTITION, 3.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 8-17.

PROBATE COURTS.

1. TO THE JURISDICTION OF THE SURROGATE IN GRANTING ADMINISTRATION two things only are essential, viz.: 1. The death of the intestate; and 2.

His inhabitancy, at or immediately preceding his death, of the county in which the administration was granted. *Bloom v. Burdick*, 299.

2. JURISDICTION TO ORDER A SALE OF REALTY DEPENDS on a petition and account. *Id.*
3. ACCOUNT REQUISITE TO WARRANT A SALE OF REALTY can not be dispensed with because an inventory has previously been filed, although a general reference to such inventory is made. *Id.*
4. IF AN ACCOUNT IS PRESENTED, its effect is not destroyed by calling it an inventory. *Id.*
5. ONE DOCUMENT MAY ANSWER THE DOUBLE PURPOSE of an account and an inventory; and an inventory made and presented at the time the petition for an order of sale is filed, may be treated as an account and give the court jurisdiction to the same extent as a separate account containing the same matters. *Id.*
6. IF IT DOES NOT CLEARLY APPEAR AT WHAT TIME THE INVENTORY WAS FILED, but there is some evidence tending to show its filing at the time the sale was petitioned for, the question whether it was filed at the proper time to support the order of sale must be submitted to the jury. *Id.*
7. APPLICATION OF PERSONAL ESTATE TO PAYMENT OF DEBTS need not be made before petitioning for a sale; it is sufficient that such application has been made when the order of sale is granted. *Id.*
8. DESCRIPTION OF LAND IN AN ORDER OF SALE, as ninety-one acres of the southwest corner of lot number eleven, is not fatally defective if the intestate owned that number of acres and no more in the lot named. *Id.*
9. JURISDICTION OVER THE PERSONS to be affected by a surrogate's sale must be obtained in some manner sanctioned by law, otherwise the proceeding will be void. *Id.*
10. SURROGATE COURT IS OF INFERIOR JURISDICTION—a mere creature of the statute. Persons claiming under its orders must show affirmatively that it obtained jurisdiction to make them by pursuing the forms prescribed by the statute. *Id.*
11. APPOINTMENT OF GUARDIAN TO APPEAR FOR AND REPRESENT INFANT HEIRS on an application to sell real estate is jurisdictional. If such appointment is not made, the order of sale is void. *Id.*

See PARTITION, 3; WILLS, 3.

PROCESS.

See CONSTITUTIONAL LAW, 6.

QUO WARRANTO.

See CONSTITUTIONAL LAW, 8.

RECEIPTORS.

See ATTACHMENTS, 8.

RELEASE OF ERRORS.

See PLEADING AND PRACTICE, 20, 21.

RELIGIOUS SOCIETIES.

See ACTIONS, 2.

REPLEVIN.

1. DELIVERY OF PROPERTY UNDER A WRIT OF REPLEVIN to the plaintiff in an action entitles him, as against the defendant, to the right of possession pending the determination of the suit. *Louvy v. Hall*, 495.
2. UNDER GENERAL PLEA OF PROPERTY WITHOUT FURTHER SPECIAL PLEA, evidence of a delivery to a defendant in an action of replevin, of the same property in a prior undetermined action in another state, may be received. *Id.*
3. DEFENDANT IN AN ACTION OF REPLEVIN IN THIS STATE may avail himself of a delivery to him of the same property pursuant to a writ of replevin issued out of a court of competent jurisdiction of another state, previously, while the parties to the action and the property in dispute were within the jurisdiction and subject to the law of the place of delivery. *Id.*

See FRAUD, 3; PLEADING AND PRACTICE, 26.

RESCISSION OF CONTRACTS.

See CONTRACTS, 4.

SALES.

1. PLACE OF DELIVERY OF ARTICLES STIPULATED IN SEALED CONTRACT is a condition precedent merely, imposed upon the party bound, which may be waived by the party entitled to its performance without producing any alteration of the original contract. *McCombs v. McKennan*, 505.
2. AGREEMENT TO ACCEPT DELIVERY AT A PLACE OTHER THAN THAT SPECIFIED in the original contract does not constitute a new contract. *Id.*
3. COVENANT MAY BE SUSTAINED UPON A CONTRACT UNDER SEAL notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was altered, and performance may be shown by evidence of a delivery at the place agreed upon. *Id.*
4. UPON A CONTRACT TO DELIVER ARTICLES AT A PARTICULAR TIME and place for a specified price, the party bound thereby, after making delivery in the manner agreed upon, if the price be not paid, may remove the articles and resell them, and may recover upon the original contract as for a breach thereof. *Id.*
5. A RECOVERY IS NOT DEFEATED BY THE ACCEPTANCE BY THE CONTRACTOR of a portion of the consideration, prior to the removal and sale by him of the articles delivered. *Id.*
6. MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE CONTRACT PRICE and the sum for which the articles were subsequently sold. *Id.*

See AUCTIONS; FRAUD, 1-3; OFFICES AND OFFICERS, 1; SPECIFIC PERFORMANCE, 1.

SELSIN.

See COVENANTS, 3.

SET-OFF.

1. DEBTS OR DEMANDS TO CONSTITUTE A SET-OFF must be due in the same right. *Coffman v. Hampton*, 512.

2. SET-OFF—MUTUAL DEBTS DO NOT EXTINGUISH EACH OTHER PER SE unless by some positive act or agreement of the parties the intention to satisfy and discharge their respective debts is clearly indicated. *Post v. Carmalt*, 484.
3. VENDEE CLAIMING SET-OFF AGAINST PURCHASE PRICE on account of claims held against the vendor, the account should be sent to a commissioner if the evidence justifies it. *Clarke v. Curtis*, 625.
See EXECUTIONS, 23.

SHERIFFS.

- A SHERIFF IS LIABLE FOR NOT LEVYING AN EXECUTION upon which there is a plain clerical mistake in the date of the judgment. *Bank of Whitehall v. Pettes*, 600.
See EXECUTIONS, 8, 9, 11-13, 16; OFFICERS AND OFFICERS, 1, 2.

SOVEREIGNTY.

See INTERNATIONAL LAW.

SPECIFIC PERFORMANCE.

1. SPECIFIC EXECUTION OF CONTRACT FOR SALE OF REAL AND PERSONAL PROPERTY for lump sum will be decreed. *Clark v. Curtis*, 625.
2. PART PERFORMANCE OF PAROL CONTRACT FOR THE SALE AND CONVEYANCE OF LAND entitles either party to the right to demand a specific performance thereof. *Pugh v. Good*, 534.
3. DELIVERY OF POSSESSION TO A VENDEE pursuant to the contract is a part performance. *Id.*
See PLEADING AND PRACTICE, 9.

STARE DECISIS.

See CONSTITUTIONAL LAW, 9.

STATUTE OF FRAUDS.

1. PROMISE OF SON TO PAY NOTE OF HIS FATHER, in case the promisee should discontinue an action commenced on such note, is within the statute of frauds, and invalid unless it is in writing. *Nelson v. Boynton*, 148.
2. GOODS CONTRACTED FOR ARE NOT WITHIN THE STATUTE OF FRAUDS when they are not in existence at the time of the contract or where some act remains to be done to put them in a condition to be delivered. *Gadsden v. Lance*, 548.
3. NO NOTE OR MEMORANDUM IN WRITING IS NECESSARY OF AN AGREEMENT depending upon a contingency which may or may not happen within a year. *Id.*
4. CONTRACT TO TRANSFER SHARES OF STOCK when the same may be opened to subscription upon the books of a corporation, is not within the meaning of any provision of the statute of frauds. *Id.*
5. THOUGH THE FOURTH SECTION OF THE STATUTE OF FRAUDS OF ENGLAND, upon which the doctrine of the effect of part performance of a parol contract for the sale of lands is founded, is omitted from the statute as enacted in the state of Pennsylvania, yet that doctrine as declared by the courts of chancery in England is recognized as a part of the law of that state. *Pugh v. Good*, 534.

6. A PROMISE TO PAY A JUDGMENT AGAINST ANOTHER if the creditor would extend a certain forbearance to the debtor, is within the statute of frauds, and must be in writing. *Allshouse v. Ramsay*, 417.
7. ACTION LIES ON PAROL PROMISE TO ACCEPT BILL to be drawn for goods sold to another, notwithstanding the statute of frauds, though such promise does not specify the amount or date of payment, where the goods are sold accordingly, the bill drawn in a reasonable time, and acceptance refused; so where, in accordance with a usage existing in such cases, the bill is drawn payable at four months and includes interest on the price of the goods after a certain date. *Kennedy v. Geddes*, 714.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS DOES NOT RUN AGAINST THE UNITED STATES, although they sue upon a note or cause of action acquired by transfer from a private person, unless the statute had begun to run before such transfer was made. *United States v. White*, 374.
2. PLEA OF NON ASSUMPSIT INFRA SEX ANNOS is not any answer to a count in a promissory note payable at a specified time after date. *Id.*
3. STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A TENANT who has disclaimed his landlord's title, until notice of the disclaimer is brought home to the landlord. *Bullard v. Copps*, 561.
4. WARRANT-HOLDER IS NOT ESTOPPED TO SET UP TITLE UNDER STATUTE OF LIMITATIONS in an ejectment suit by the holder of a prior warrant, by the fact that his application fixes the commencement of his improvement within the statutory period, where his actual adverse possession began a sufficient length of time before the date so fixed. *Graffius v. Tottenham*, 472.
5. THE TIME OF LIMITATION OF AN ACTION UPON A CONTRACT depends upon the law of the place where the action is instituted, and not upon the law of the place of contract. *King v. Lane*, 187.
6. THE SAVING IN A STATUTE OF LIMITATIONS OF A REMEDY UNTIL THE "RETURN" of the defendant, where the cause of action has arisen abroad, applies as well to foreigners who have never been in the state as to citizens. *Id.*
7. NEGLIGENCE OF PARTY TO PROCEED against one who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitations interposes. *Porter v. Foster*, 59.
8. ENTRY BY A STRANGER IN THE NAME OF THE OWNER OF THE FREEHOLD, may, by ratification, become the act of the latter, and will then be sufficient to prevent the bar of the statute of limitations from attaching. *Campbell v. Wallace*, 219.
9. STATUTE OF LIMITATIONS APPLIES TO TRUSTS COGNIZABLE AT LAW as well as in equity, and may be pleaded to an action for money had and received, brought to recover surplus moneys collected by a surety or indorser on securities deposited with him by the principal debtor for his indemnification, after such surety or indorser has been reimbursed the amount which he has been compelled to pay for the debtor. *Finney v. Cochran*, 450.

See ARBITRATION AND AWARD, 7; CORPORATIONS, 6; EVIDENCE, 10.

STATUTES.

See EVIDENCE, 17; GAMING; INFANCY, 1; JUDICIAL SALES, 1.

STATUTORY BONDS.

See BONDS.

SUBROGATION.

See SURETYSHIP, 5.

SUCCESSION.

ESTATE IN FEE IS PRESUMED TO DESCEND ON DEATH OF ANCESTOR in pursuance of the laws of inheritance, unless the descent is shown to have been interrupted by a devise. *Baxter v. Bradbury*, 49.

See CO-TENANCY, 1.

SURETYSHIP.

1. SURETY FULLY INDEMNIFIED BY THE PRINCIPAL DEBTOR, is not released by an extension of time given the latter. *Chilton v. Robbins*, 741.
 2. SURETY CAN NOT REQUIRE CREDITOR TO EXHAUST HIS REMEDIES against the principal before resorting to the surety, except under special circumstances. *Abercrombie v. Knox*, 721.
 3. POSITIVE AND WILLFUL INTERFERENCE by a creditor, embarrassing the recovery of the claim against the principal, will release the surety. *Bank of Manchester v. Bartlett*, 594.
 4. A SURETY MAY IN EQUITY COMPEL the principal to pay the debt after it has become due. Persons who agree to save harmless the maker of a promissory note are principals with respect to the maker and within the application of the above rule. *Bishop v. Day*, 582.
 5. SURETY PAYING DEBT IS ENTITLED TO BE SUBROGATED to the creditor's right to enforce a judgment previously recovered on a note given by a third person after several judgments against the principal and surety, as collateral security to obtain a stay of execution against the principal. *Pott v. Nathans*, 456.
 6. GUARANTOR IS ENTITLED TO NOTICE of the acceptance of his guaranty. *Oaks v. Weller*, 583.
 7. TO MAKE GUARANTY NEGOTIABLE AS PART OF NOTE to which it relates, it must be on the note itself, or annexed to it, in the nature of an *allonge*. *McLaren v. Watson*, 280.
 8. GENERAL GUARANTY OF NEGOTIABLE NOTE BY SEPARATE AND DISTINCT INSTRUMENT, containing no words of negotiability, is not negotiable, and can not be sued on by an assignee of the note and guaranty, in his own name. *Id.*
 9. THE CONTRACT OF A GUARANTOR IS CONDITIONAL where it is continuing, or where it relates to a future transaction; and in such cases, to determine the liability of the guarantor, demand must be made upon the principal debtor, and notice given to the guarantor of the failure of the latter to pay. *Lane v. Levillian*, 769.
 10. AN UNDERTAKING OF A GUARANTOR IS PRIMARY, and he is entitled neither to demand nor notice, if his contract relate to a debt already due. *Id.*
- See BONDS, 1; EXECUTORS AND ADMINISTRATORS, 1; HUSBAND AND WIFE, 6; STATUTE OF LIMITATIONS, 9.

SURROGATE COURT.

See PROBATE COURT.

TAXATION.

PERSONAL PROPERTY OF A WARD CAN NOT BE TAXED in the district in which his guardian has his domicile, where the ward lives with his mother in another district, the father being dead and the mother having since remarried. *School Directors v. James*, 525.

TENANTS AT WILL.

See LANDLORD AND TENANT, 9.

TENANTS IN COMMON.

See CO TENANCY, 2-4; LANDLORD AND TENANT, 1, 2, 4, 5; PARTITION, 1.

TENDER.

1. **DECLARATION OF WILLINGNESS TO PAY FOR THE VALUE OF THE LABOR**, when the article shall be delivered, is not equivalent to an actual tender by a plaintiff in an action of replevin. *McIntyre v. Carver*, 519.
2. **TENDER AFTER SUIT BROUGHT TO RECOVER SPECIFIC PROPERTY UPON WHICH A LIEN** for services is claimed, does not entitle plaintiff to his costs, though the tender be of the full amount claimed by defendant, exclusive of costs, and though the sum offered is thereupon accepted. *Id.*

See EXECUTIONS, 22.

TRESPASS.

1. **TRESPASS LIES WHETHER INJURY IS WILLFUL OR NOT**, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; thus, where defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass. *Newsom v. Anderson*, 406.
2. **POSSESSOR OF PROPERTY MAY MAINTAIN TRESPASS** against a mere wrong-doer without showing the extent of his right. *Potter v. Washburn*, 615.
3. **TAKING OF GOODS BY A WRONG-DOER FROM A TRUSTEE ON ATTACHMENT PROCESS**, does not discharge the latter, but furnishes a reason for delaying proceedings, until damages for the taking can be recovered. *Despatch Line v. Bellamy Mfg. Co.*, 203.
4. **TRESPASSER IN POSSESSION OF ANOTHER'S GOODS** can not be charged as trustee of the owner. *Id.*
5. **A TREE STANDING DIRECTLY UPON THE LINE BETWEEN ADJOINING OWNERS** is the common property of both parties, and trespass will lie if one cuts and destroys it without the consent of the other. *Griffin v. Bixby*, 225.
6. **OWNER OF A CHATTEL WRONGFULLY TAKEN FROM HIS POSSESSION** and placed upon the land of another, may lawfully enter and retake it, and is not liable even for nominal damages for so doing. *Chambers v. Bedell*, 508.

See AGENCY, 3; EXECUTIONS, 16; FRAUD, 3, 4; LANDLORD AND TENANT, 12.

TROVER.

1. WHERE PARTY IS IGNORANT OF TITLE OF THIRD PERSON at the time he enters into a contract of exchange, but is afterwards informed of it, and then continues to claim and use the article exchanged, he is guilty of conversion, and an action of trover may be maintained against him without a demand. *Porter v. Foster*, 59.
2. WHERE PARTY SELLS PROPERTY CLAIMED BY ANOTHER and the proceeds are placed in the hands of a third person to abide a decision of their respective rights, and such party persuades the third person to pay him the sum he has received without the privity or consent of the other, he waives the benefit of any arrangement made with the third person, and becomes liable at once to the other party if he was the owner of the property, though no decision has been rendered nor demand made of the defendant. *Higgins v. Brown*, 54.

See ATTACHMENTS, 8; FRAUD, 3.

TRUSTS AND TRUSTEES.

EVERY PERSON IS TRUSTEE WHO RECEIVES MONEY TO BE PAID to another, or to be applied to a particular purpose to which he does not apply it, and is liable either at law for money had and received, or in equity for breach of trust. *Finney v. Cochran*, 450.

See FRAUDULENT CONVEYANCES, 4; PLEADING AND PRACTICE, 2, 5; STATUTE OF LIMITATIONS, 9; TRESPASS, 3, 4.

USAGE.

1. THE USAGES AND CUSTOMS OF A BANK BIND THE PARTIES to a note made payable there. *Planters' Bank v. Markham*, 162.
2. WHERE BY THE CUSTOM OF A BANK THE MAKER OF A NOTE payable there has until the close of business hours within which to pay, a demand of payment will not be sufficient to charge the indorsers unless the note is left at the bank until the close of business hours. *Id.*
3. EVIDENCE OF USAGE FOR CARRIERS TO CHARGE LIGHTERAGE for transporting goods over shoals in a river when the water is so low that the carrier's boats can not pass the shoals with their cargo, is admissible in an action to recover freight, although the written bill of lading specifies the rate of freight, and says nothing as to lighterage. *Andrews v. Roach*, 718.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 12.

USURY.

1. CONTRACT IS USURIOUS, WHEN.—A party borrowed a sum of money from another, and for security pledged a slave, the lender to have the use of the slave for interest; as the value of the slave was greater than legal interest on the sum advanced, the contract was held usurious. *Raynolds v. Carter*, 642.
2. BOND GIVEN TO REDEEM SLAVE IN SUCH A CASE is usurious and void. *Id.*
3. USURIOUS BOND IS VOID IN HANDS OF THIRD PERSON, not an assignee for value, without notice. *Id.*

4. **PLEA OF USURY IS DEFECTIVE** if it do not allege a corrupt agreement upon the part of the lender to take more interest than the law allows. *McFarland v. State Bank*, 761.

VENDOR AND VENDEE.

1. **RIGHT OF PURCHASER OF LAND TO A GOOD TITLE** is given by the law, and does not rest upon the agreement of the parties. *Oulhens v. Branch Bank*, 725.
2. **EQUITY WILL NOT REQUIRE PAYMENT OF PURCHASE MONEY** when a pre-existing incumbrance is discovered, no conveyance having been executed. *Id.*
3. **RULE OF CAVEAT EMPTOR APPLIES TO PURCHASE OF REAL ESTATE** after the conveyance has been executed and received; and the purchaser can not recover back the purchase money if paid, nor resist an action therefor, if unpaid, unless as a consequence of covenants contained in his deed. *Id.*
4. **EVICTON OR FAILURE OF TITLE** does not at law constitute a defense to an action for the purchase price of lands, although the conveyance thereof contained covenants of general warranty. *Id.*
5. **FRAUD IS NOT AT LAW A DEFENSE** to an action to recover the purchase price of lands, if the purchaser has accepted a conveyance, and retains possession of the land. *Id.*
6. **REMOVAL OF INCUMBRANCES NOT A CONDITION PRECEDENT, WHEN.**—Where defendant agreed to remove certain incumbrances from premises conveyed to plaintiff by a certain day, in consideration thereof to be allowed a certain sum on a debt due plaintiff, the removal of the incumbrances by that day is not a condition precedent, and defendant not having removed the incumbrances till the day had passed, he is still entitled to set off the sum stipulated in an action by the plaintiff on the original indebtedness, the plaintiff not having reconveyed the premises to him. *Roberts v. Marston*, 52.
7. **WHERE PLAINTIFF HAS SUFFERED DAMAGES BY THE DELAY**, in such a case, he has a right to have them deducted from the amount he agreed to allow for the premises. *Id.*
8. **WHERE THE VENDEE WAIVES HIS RIGHT TO ABANDON A CONTRACT** for the sale of land, he will be compelled to perform it. *Pugh v. Cheseldine*, 414.
9. **VENDEE IN POSSESSION CAN NOT DEFEND** against an action for the payment of the purchase money of land. *Giles v. Williams*, 692.
10. **ASSIGNMENT OF TITLE BOND** executed with the condition that the obligor should make the obligee a good title to a certain tract of land, does not affect the duty of the obligor to make a good title to the obligee, and a tender of a deed of the land to the assignee is not a performance of the condition. *Wallace v. Shaffer*, 687.
11. **VENDEE OF LAND IS NOT ENTITLED TO DEDUCTION FOR DEFICIENCY** in quantity of the land conveyed, from the amount of the bond given therefor, where the sale is *per aversionem*, or for a gross sum for the whole premises, and not at a stipulated price per foot or acre, the land being described by designated boundaries, followed by a specification of the quantity, unless there has been fraud or willful misrepresentation by the vendor. *Morris Canal Co. v. Emmett*, 388.

See **CONTRACTS**, 3; **COVENANTS**, 1, 7; **EQUITY**, 6; **FIXTURES**, 4, 9; **LIENS**, 5, 6; **SET-OFF**, 3.

WARRANTY.

See COVENANTS, 4, 5.

WAR, PUBLIC AND PRIVATE.

See INTERNATIONAL LAW.

WATERCOURSES.

1. OWNER OF LAND THROUGH WHICH STREAM RUNS IS ENTITLED to the continuance of its natural flow, subject only to the right of eminent domain, and any one impairing his right is liable in damages. *Ten Eyck v. Del. & R. Canal Co.*, 233.
2. REGULATION OF NAVIGABLE WATERS WITHIN THE STATE is vested in the sovereign power, to be exercised by laws duly enacted. *Parter v. Outer Milldam Co.*, 56.
3. WHERE DAM IS ERECTED ACROSS NAVIGABLE WATERS by a corporation under authority of an act of the legislature, the corporation is not liable to a riparian owner below for damages occasioned by altering the flux and reflux of the tide. *Id.*
4. COLONIAL ORDINANCE OF 1641 EXTENDING RIGHT OF RIPARIAN PROPRIETOR in the soil from high to low-water mark, where it did not exceed one hundred rods, did not grant away any of the public right of fishery. *Id.*

See CORPORATIONS, 8, 10; FERRIES, 1.

WILLS.

1. IT IS NECESSARY TO VALIDITY OF NUNCUPATIVE WILL that the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, appear by the clearest and most indisputable testimony. *Dorsey v. Sheppard*, 77.
2. NUNCUPATIVE WILL MADE BY INTERROGATORIES REQUIRES STRONGER PROOF of spontaneity and volition than would be required in an ordinary case. *Id.*
3. PROBATE OF NUNCUPATIVE WILL MADE BY INTERROGATORIES WILL BE REFUSED where facts leave doubt as to the mental capacity of the testator, and there is not sufficient proof of spontaneity and of the *animus testandi*. *Id.*
4. PUBLICATION OF WILL IS NECESSARY, UNDER NEW YORK STATUTE OF 1830, to give it validity, and to constitute such publication there must be some communication by the testator to the witnesses at the time of signing or acknowledging the will, indicating an intention to give effect to the paper as the testator's will, but no particular form of words is necessary. *Remsen v. Brinckerhoff*, 251.
5. MERE WANT OF RECOLLECTION OF WITNESSES TO WILL, that the testator indicated the instrument to be his will, is not evidence *per se* of non-compliance with requisites of the New York statute of 1830, as to publication, where the attestation clause states that the testator declared the instrument to be his will. But where the witnesses testify that neither the attestation clause nor the will was read by them, and that the testator did not state the instrument to be his will, but at the time of signing merely acknowledged it to be his "hand and seal for the purpose thereof."

- mentioned," there is no proof of publication, and the will is inoperative, although the attestation clause may state that there was publication. *Id.*
6. LEGACY IS ADEEMED WHEN the parent, who gives the legacy afterwards upon the child's marriage, makes an advance to her in the nature of a portion. *Hansbrough v. Hooe*, 659.
 7. DOCTRINE OF ADEEMPTION APPLIES TO BEQUESTS OF REALTY as well as to bequests of personalty (TUCKER, P., dissenting). *Id.*
 8. DEVISE OF REALTY IS ADEEMED WHEN the testator on the marriage of the devisee advanced her another equally large tract of land as a portion (TUCKER, P., dissenting). *Id.*
 9. CONDITION IS IMPLIED IN A LEGACY that the legatee shall survive the testator. *Comfort v. Mather*, 523.
 10. LEGACY IS LAPSED BY DEATH OF LEGATEE during the life-time of testator. *Id.*
 11. TESTATOR'S KNOWLEDGE OF DEATH OF LEGATEE IS IMMATERIAL, if he made no alteration of his will thereafter, although he may have intended that the children of the legatee should take. *Id.*
 12. INTENTION OF TESTATOR CAN NOT BE ALLOWED TO CONTRAVENE OR ALTER THE LEGAL INTERPRETATION and consequences of his written will, nor are his parol declarations of his understanding of the meaning of his will admissible for that purpose. *Id.*
 13. VESTED LEGACY IS GIVEN BY A BEQUEST of the interest of a sum to the testator's wife for life, and after her death giving the principal to the testator's children "or their heirs" to be divided equally, and on the death of one of the children, living the wife, his share, at her death, goes to his personal representative. *King v. King*, 459.
 14. A LIMITATION IN A WILL OVER OF A LIFE ESTATE TO TESTATOR'S WIFE to the effect that if she shall have an heir at the time of her death, the estate shall descend to that heir, is a limitation in favor of any child which the wife may have, either by the then existing or any subsequent marriage, the word "heir" in the connection in which used in this case evidently not being employed in its technical sense. *Rumsey v. Joyce*, 551.

See HUSBAND AND WIFE, 4.

WITNESSES.

HE IS INTERESTED AND AN INCOMPETENT WITNESS who has covenanted with the defendant to pay certain notes set off against the plaintiff, nor will the witness' releases to plaintiff and defendant make him competent. *Newton v. Booth*, 596.

See ATTACHMENTS, 7; ATTORNEY AND CLIENT, 8-17; EVIDENCE, 6, 12, 13; NEW TRIAL, 1; WILLS, 5.

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